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CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

OF THE

STATE OF MISSOURI,

FROM DECEMBER 13, 1892, TO JANUARY 31, 1893.

REPORTED BY
DAVID GOLDSMITH, of the St. Louis Bar,
AND
BEN ELI GUTHRIE, of the Macon City Bar,
OFFICIAL REPORTERS.

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JUDGES OF THE

ST. LOUIS COURT OF APPEALS.

HON. RODERICK E. ROMBAUER, *Presiding Judge.*

HON. SEYMOUR D. THOMPSON, } *Judges.*
HON. WILLIAM H. BIGGS, }

JOHN LEWIS, *Clerk.*
DAVID GOLDSMITH, *Reporter.*

JUDGES OF THE

KANSAS CITY COURT OF APPEALS.

HON. J. L. SMITH, *Presiding Judge.*

HON. JAMES ELLISON, } *Judges.*
HON. T. A. GILL, }

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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

OCTOBER TERM, 1892.

William H. Fry *et al.*, Executors of Jacob Fry, Respondents, v. Fielden Estes, Appellant.

52 1 / 62 430 — 52 1 / 67 205 — 52 1 / 151m 291

St. Louis Court of Appeals, December 13, 1892.

1. **Value of Legal Services:** COMPETENCY OF NON-EXPERT WITNESSES. The value of legal services cannot be established by the opinion of a witness, who is not shown to be an attorney-at-law or in any way qualified to speak on the subject.

2. **Value of Crops and Farming Implements:** EXPERT EVIDENCE. Witnesses, shown to be farmers of many years' experience, are *prima facie* qualified to testify in regard to the value of crops, cattle and farming implements. If, on their cross-examination, it appears that they are not familiar with the value of the grain or cattle, because they had not seen them, or for other reasons, that will not put the trial court in the wrong for admitting their testimony in the first instance.

3. **Damages for Wrongful Attachment:** COUNSEL FEES. In an action for damages for a wrongful attachment, only such counsel fees can be recovered as were incurred in obtaining the dissolution of the attachment. Accordingly it was *held* in this cause, wherein the attachment was dissolved on the hearing of the plea in abatement, that it was erroneous to admit proof of the amount of all the counsel fees in the case.

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4. **Practice, Trial:** GENERAL OBJECTIONS TO EVIDENCE. An objection that evidence is incompetent goes for naught. The trial court is entitled in every instance to be informed of the specific nature of the objection, so as to rule thereon intelligently.

5. **Evidence:** ADMISSIONS IN PLEADINGS. The admissions of a party to the action, made in pleadings in other litigation, are treated herein as competent evidence against such party.

6. **Wrongful Attachment.** EXEMPLARY DAMAGES. An instruction is erroneous, if it authorizes the assessment of exemplary damages, when a party wrongfully suing out a writ of attachment acts without probable cause and is actuated by any hostile, angry, vindictive, mercenary or malicious motives, since, being in the disjunctive, it warrants the assessment of exemplary damages for the existence in such case of merely mercenary motives.

7. **Right of Action for Wrongful Attachment.** An action, not based upon the attachment bond but sounding simply in tort, lies for wrongful attachment in this state, though the suing out of the attachment is not accompanied by malice or the want of probable cause.

8. ———: PLEADING. In such action there is no occasion for a separate count, based upon malice and the want of probable cause, and the joinder of one is, therefore, improper. Where the plaintiff seeks to recover for a malicious attachment, he may allege in one count the wrongful attachment and the existence of malice, and recover such damages as are secured by the attachment bond without proof of malice.

Appeal from the Pike Circuit Court.—HON. E. M. HUGHES, Judge.

REVERSED AND REMANDED.

Nat. C. Dryden, for appellant.

D. A. Ball and *M. G. Reynolds*, for respondents.

ROMBAUER, P. J.—The action is one to recover damages caused to the testator of the plaintiffs by the wrongful prosecution of a writ of attachment. The petition contains two counts. The first alleges a wrongful prosecution of the writ, the attachment of the decedent's property thereon, the final dissolution of the

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attachment, and damages, direct and consequential, arising to the decedent from the attachment in the amount of $2,500. The second count contains a reference to the first, and states that the attachment was sued out maliciously and without any probable cause, and seeks a recovery of damages to the amount of $5,000 for injury to the decedent's feelings, credit and business operations, and legal expenses in defending the suit. There was a verdict for the plaintiffs in the sum of $1,534 on the first count, and in the sum of $500 on the second count, and judgment was entered accordingly.

A large number of errors are assigned, of which we shall notice specially only those hereinafter mentioned. Others, to which the defendant either did not properly except and save his exceptions, or which are not clearly shown by the record, we will notice in a general way so as to prevent their recurrence upon a retrial of the cause.

In the course of the trial the plaintiffs called two witnesses, designated in the record, without giving their first names, as Mr. Blair and Mr. Dempsey. These witnesses were called for the purpose of proving the reasonable value of the services of counsel for the plaintiffs' decedent in the litigation. It was not shown that they were attorneys-at-law, or in any way qualified to speak on the subject. The defendant objected to their evidence, because it did not appear that they had any actual knowledge or expert opinion on the subject. The court overruled the objection and the defendant excepted. This was clearly erroneous. The court may have known that the parties thus called were attorneys-at-law, and, as the question whether they were qualified to give expert testimony was one for the court, may on that ground have admitted their testimony without further proof. But, since that question is subject to

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review, we have no means to determine that the court did not err in overruling the defendant's exception, because the witnesses, as far as the record shows, were clearly unqualified to speak on the question. Another objection to all the testimony offered by the plaintiffs, on the subject of counsel fees, is that it was not confined to counsel fees incurred in obtaining a dissolution of the attachment (which alone are recoverable in this action), but that it related to *all counsel fees in the case*. *State to use v. McHale*, 16 Mo. App. 478, 482, and cases cited. In the case at bar the judgment on the plea in abatement was in favor of the defendant in the attachment suit; hence, the exception mentioned in the *McHale case* is not applicable. This last objection is not properly saved, and we merely notice it as a guide to the trial court upon retrial. Similar errors were committed in admitting evidence of traveling expenses incurred, not by decedent but by others, without showing that such traveling expenses were necessarily incurred in obtaining the dissolution of the attachment.

Champ Clark, an attorney-at-law, was called by the plaintiffs and also gave evidence touching reasonable attorney's fees *in the whole case*. On his further examination he was asked by plaintiffs' counsel whether he had not been consulted by the defendant touching the attachment suit, and what his advice was. Objection was made to this inquiry, because the communication was privileged. The court properly sustained the objection. Notwithstanding this ruling, counsel for plaintiffs persisted in asking the witness several other questions on the same subject, all of which the court ruled out. There was no error on the part of the court in this matter, but there was misconduct on the part of counsel for the plaintiffs, and its recurrence should be avoided. This conduct became all the more prejudicial

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in that the plaintiffs' counsel was permitted in his argument to the jury to comment on the attorney's advice, which had been ruled out. There was no error in permitting the cross-examination of the defendant on this subject. *Weinstein v. Reid*, 25 Mo. App. 41.

Before leaving the question of evidence, we deem it proper to remark that there was no error in permitting the plaintiffs' witnesses to testify as to the value of the crops, cattle and farming implements. The witnesses had *prima facie* qualified themselves to testify on the subjects by showing that they were farmers of many years' experience. If, on their cross-examination, it appeared that they were not familiar with the value of the grain or cattle in question, because they had not seen them, or for other reasons, that fact could not put the court in the wrong for admitting their testimony before such showing was made. The testimony as to farming implements and stock possessed by the decedent in years succeeding the attachment was irrelevant, and should have been excluded. But we must also say in this connection that we cannot put the court in the wrong for disregarding general objections, and that the defendant's objections in most instances were too general to be noticed. An objection that evidence is incompetent goes for naught, although the evidence may be wholly irrelevant. The court is entitled in each instance to be informed of the specific nature of the objection, so as to rule intelligently thereon, and there is no excuse for not making such objection specific in every instance, particularly since the presence of a short-hand reporter at the trial enables parties to do so without any loss of time.

The defendant on the opening of the trial objected to the introduction of any evidence in support of either count of the petition, on the ground that neither stated a cause of action. The court overruled the objection

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and the defendant excepted. No error is assigned on this ruling, and we shall notice it hereafter only for the purpose of guiding the court in a retrial of the cause. The defendant also demurred to the evidence by instruction at the close of the plaintiffs' evidence, and now claims that this demurrer should have been sustained, because there is no evidence in the record that the plaintiffs were executors of Jacob Fry. Among the evidence introduced by the plaintiffs were several answers filed by the defendant in former actions between the same parties, containing the admissions that the plaintiffs were such executors; hence, the point now made, that the court should have nonsuited the plaintiffs for this omission in their proof, is not well taken.

The court at plaintiffs' instance gave, among others, the following instruction, which is challenged as erroneous: "On the first count of the petition: If the jury believe from the evidence in the cause that the defendant Estes, on or about the second day of June, 1881, instituted a suit by attachment against deceased, Jacob Fry, and caused to be attached the property mentioned in the first count of plaintiffs' petition, and that at the trial of the plea in abatement, filed by said Jacob Fry, deceased, the verdict of the jury and judgment of the court was in favor of said Jacob Fry, deceased, and against the defendant Estes, dissolving the attachment, and that Jacob Fry is now deceased, and that plaintiffs are the executors of his estate, then your verdict must be for the plaintiffs in such sum as you believe from the evidence in the case the property was worth at the time it was attached, together with six per cent. interest from the time said property was attached, less the sum of $387.81 paid to plaintiffs in 1890 by the receiver as the net proceeds of the wheat. And you may give such further damages as you may believe the estate of Jacob

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Fry has sustained by reason of said attachment suit, including all traveling expenses, together with a reasonable attorney fee as you believe should be allowed from the evidence in the case, not to exceed together the amount claimed in the first count of the petition."

Conceding that the first count did state a cause of action, yet this instruction was erroneous. There is no statement therein on what amount the six per cent. interest was to be allowed, nor what traveling expenses were referred to, and the attorney's fees are not limited to attorney's fees necessarily incurred in obtaining a dissolution of the attachment, but such as the jury may believe should be allowed in the case from the evidence.

Where the court instructs the jury on the *measure of damages*, it must instruct them correctly, because the measure of damages is a question of law. *Kick v. Doerste*, 45 Mo. App. 134, 141, and cases cited.

On the second count of the petition the court gave to the jury, among others, the following instruction which is challenged as erroneous: "If the jury believe from the evidence in the case that the defendant Estes in the said attachment suit was actuated by any hostile, angry, vindictive, mercenary or malicious motive against said Jacob Fry, and that said attachment suit was without probable cause, as defined by the court in a former instruction, then you should find a verdict for the plaintiffs on the second count in their petition."

It will be noticed that this instruction is on the question of malice, and uses the adjectives applicable to the defendant's motives in the disjunctive. Under this instruction the jury were not only warranted but instructed to find malice in the attachment from the fact that the defendant was actuated by a mercenary motive, and acted without probable cause. Since

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mercenary is no more than sordid or avaricious, the jury were substantially instructed to find malice from an over anxiety on the part of defendant to collect a debt which he claimed was due, if no probable cause for the attachment existed. Such is not the law. *Grant v. Reinhart*, 33 Mo. App. 74–82.

We must, therefore, conclude that both these instructions were erroneous and prejudicial.

In remanding the case for a new trial we will pass on some propositions raised upon the trial and by the record, although no error is assigned upon them in this court. The defendant at the trial objected to the introduction of any evidence in support of the first count, on the ground that it failed to state any cause of action. When the court overruled this objection, he saved his exception and preserved it by motion for new trial. Although the ruling of the court is not expressly assigned for error in this court, we are bound to decide whether the first count does state a cause of action.

It will be noticed that the first count is not an action upon the attachment bond and does not even allege that an attachment bond was given, although it appeared upon the trial that such bond was given. Nor does the first count allege either malice or the want of probable cause in the prosecution of the attachment, but simply states that the attachment was wrongfully sued out. It is evident, therefore, that the first count states no cause of action at common law, because it shows no liability on the part of the defendant either upon a contract raised by the bond, or an action upon the case at common law,—malice and want of probable cause being essential ingredients of the latter action. Cooley on Torts, 180; Drake on Attachment [7 Ed.] sec. 114; *Lindsay v. Larned*, 17 Mass. 189.

Since the supreme court first decided in *State v. Thomas*, 19 Mo. 613, that, in actions upon an attach-

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ment bond, only the natural and proximate damages resulting from the suing out of the attachment could be recovered, and neither injuries to credit nor exemplary damages, it has been the practice to sue upon the bond in one count, and add one count for the malice as at common law in an action on the case. That was the course pursued in *Alexander v. Harrison*, 38 Mo. 258, and in *Grant v. Reinhart*, 33 Mo. App. 74. The cases of *Walser v. Thies*, 56 Mo. 89, and *Scovill v. Glasner*, 79 Mo. 449, were purely proceedings for malicious attachment. No case can be found in this state wherein the plaintiff sued in one count for the wrongful, and in the other for the malicious, attachment of his property, nor is there any reason for adopting that course, since, if an action on the case will lie for a *wrongful* attachment, malice in the attachment merely goes in aggravation of the damages and furnishes no independent cause of action. It has been held on the one hand that a suit for the wrongful suing out of an attachment must be upon the bond. *Abbott v. Whipple*, 4 Greene (Iowa) 320. But it has also been held on the other hand that a person may sue for malicious attachment, and, if he fail in establishing malice, recover actual damages caused to him by the attachment, if it was wrongful. *Kirksey v. Jones*, 7 Ala. 622; *Reed v. Samuels*, 22 Tex. 114; *McLaughlin v. Davis*, 14 Kan. 168. These latter cases seem to rest on the theory that the statute recognizes a liability on the bond for an attachment which is wrongful, even though not malicious, and hence the party aggrieved may either sue in debt on the undertaking, or in case for the wrong. As the question is one which does not substantially affect the right of recovery, but only the form of action, we see no reason why a party in this state may not sue for a wrongful attachment in tort, even though the attachment was not malicious, and, hence, we hold that the

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first count of plaintiffs' petition did state a cause of action. At the same time no useful end can be subserved by dividing his action into two counts, as the cause of action in both counts is the same, and, hence, we must hold that the proper course, in cases where the party seeks to recover damages for malicious attachment, is to frame his petition accordingly, and to do it in one count. If he fail in establishing malice, which merely goes in aggravation of damages, he may still recover such damages as he could have recovered in an action upon the bond for the wrongful attachment.

The judgment is reversed and the cause remanded. Judge THOMPSON concurs. Judge BIGGS, having been of counsel, does not participate in the decision.

THE DRUMMOND TOBACCO COMPANY, Appellant, v. THE ADDISON TINSLEY TOBACCO COMPANY, Respondent.

St. Louis Court of Appeals, December 13 and 27, 1892.

1. **Trademarks, Infringement of:** SUFFICIENCY OF IMITATION. In order to entitle the owner of a trademark to relief against imitation, it must appear that the similarity between the trademark and the alleged infringement was such as to deceive the ordinary consumer of the article to which the same was attached; but it is not necessary to establish that anyone was actually deceived by the imitation.

2. ———: ———: INSPECTION: EXPERT EVIDENCE. While the main test of the alleged resemblance is an inspection by the court of the original trademark and of the alleged infringement, nevertheless, in determining whether an ordinary customer, having neither the opportunity for comparison nor the time for examination, would be likely to be deceived by the similarity, the opinion of witnesses familiar with the trade, and the habits of the customers, is of weight, and, when aided by evidence of actual deception, should be controlling, unless the dissimilarity between the two marks is such as to exclude any probability of deception.

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3. ——: ——: EFFECT OF FRAUDULENT DESIGN. While a fraudulent design need not be shown in order to entitle the owner of a trademark to the protection of his proprietary rights by injunction, when an interference therewith has been established by unequivocal proof, still less cogent evidence of the probability of deception by means of the imitation will suffice when an intention to deceive has been shown. In such a case it is not necessary that the resemblance between the trademark and the imitation should be so close as to deceive purchasers exercising ordinary care and prudence, but only that the similitude should be sufficient to deceive the incautious and unwary.

4. ——: RIGHT OF OWNER OF TRADEMARK TO AN ACCOUNTING. This cause was one to enjoin an infringement of the plaintiff's trademark. The defendant had used the imitation in various shapes and forms for many years, and for part of the time without active objection on the part of the complainant. During this use, different changes in the shape and general appearance were introduced in the course of attempts at an amicable adjustment between the parties, and by reason of these matters a proper accounting was rendered difficult. Under these circumstances the accounting prayed for by the plaintiff was denied, without prejudice to his right to proceed at law for damages, if so advised.

5. ——: JURISDICTION, APPELLATE: AMOUNT INVOLVED. It appeared that the defendant had spent $10,000 in advertising its brand of goods, to which its trademark was affixed. The decree rendered in this court restrained the defendant from using the alleged infringement, or any colorable imitation of the plaintiff's trademark, but did not prohibit the defendant from advertising its brand of goods, and, morover, permitted the defendant to change its trademark into a form theretofore agreed upon by it and the plaintiff. *Held*, on motion for a transfer of this cause to the supreme court, after the decision thereof by this court, that this court had jurisdiction of the appeal taken from the trial court herein.

Appeal from the Louisiana Court of Common Pleas.
HON. E. M. HUGHES, Judge.

REVERSED *(and decree entered in this court).*

Smith & Harrison, *D. P. Dyer* and *W. H. Morrow*, for appellant.

(1) A manufacturer, adopting a certain symbol or device and affixing it to his goods as a trademark, if

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the same be in law a proper trademark, acquires an exclusive right to the use of that particular symbol or device, in connection with that particular class of goods which he so manufactures and stamps with such symbol or device; and he is entitled to the interposition of a court of equity to enforce this right by perpetual injunction against anyone invading it. High on Injunction [3 Ed.] sec. 1085; *Taylor v. Carpenter*, 11 Paige, 292; *Hostetter v. Vowinkle*, 1 Dillon, C. C. 329. (2) The jurisdiction of the courts in trademark cases seemed originally to rest on fraud upon the part of defendant; but the test is not whether the offending party intended to commit the fraud to deceive; but it consists in actual deception or the creation of a possibility of deception, independent of any actual fraudulent intent. *Delaware v. Clark*, 7 Blatch. 112; *Croft v. Day*, 7 Beav. 84; *Curtis v. Bryan*, 2 Daly, 312; *Messerole v. Tynberg*, 36 How. Pr. 14; *Lockwood v. Bostwick*, 2 Daly, 521; *McCann v. Anthony*, 21 Mo. App. 83; *Coffeen v. Brunton*, 3 McLean, 516; *Davis v. Kendall*, 2 R. I. 566; *Edelston v. Vick*, 11 Hare, 78; *Clement v. Maddock*, 5 Jur. (N. S.) 592; *Cartier v. Cartier*, 31 Beav. 292; *Harmon v. Taylor*, 11 Jur. (N. S.) 408; *Glenny v. Smith*, 11 Jur. (N. S.) 964; *Crucible Co. v. Guggenheim*, 2 Brewst. 321; *Millington v. Fox*, 3 My. & Cr. 338; *Hall v. Barrows*, 33 L. R. Ch. 204; *Mfg. Co. v. Wilson*, 2 Ch. D. 434–53; *Mfg. Co. v. Spear*, 2 Sand. S. C. Rep. 599. (3) The legal test is not whether a wary or cautious man, or one skilled in that particular business, would be likely to be misled by the imitation; but whether it is such as would likely deceive the ordinary purchaser, purchasing with ordinary caution, or the careless and unwary. *McCann v. Anthony*, 21 Mo. App. 83, 88–90; High on Injunction [3 Ed.] secs. 1088–1089; Sebastian on the Law of Trade-Marks [2 Ed.] 121, and cases cited; *Seixo v. Provezende*,

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L. R. 1 Chan. App. Cas. 192; *Williams v. Spence*, 25 How. Pr. Rep. 366; *Celluloid Co. v. Mfg. Co.*, 32 Fed. Rep. 94; *Glenny v. Smith*, 11 Jur. (N. S.) 964; per Lord CHELMSFORD in *Witherspoon v. Currie*, L. R. 5 H. L. 508; *In re Farina*, 27 W. R. 456; *Burrows v. Knight*, 6 R. I. 434; *McLean v. Fleming*, 96 U. S. 245; *Gorham Co. v. White*, 14 Wall. 511; *Godillot v. Harris*, 81 N. Y. 263; *Colman v. Crump*, 70 N. Y. 573; *Leidersdorf v. Flint*, 50 Wis. 401; *Clark v. Clark*, 25 Barb. 79; *Brooklyn, etc., v. Masuary*, 25 Barb. 416. (4) Nor is the legal test, whether seen side by side the two symbols would deceive the ordinary purchaser into mistaking the one for the other, but whether the defendant's tobacco, stamped with its mark and separately exposed for sale, would probably be mistaken by purchasers for the plaintiff's tobacco to which its "horseshoe" trademark is affixed. High on Injunction [3 Ed.] sec. 1088; *Wilson v. Crowley*, 3 Blatch. 340; *Lockwood v. Bostwick*, 2 Daly, 521; *Fertilizer Co. v. Woodside*, 1 Hughes' U. S. C. C. 115; *Mfg. Co. v. Leudeling*, 22 Fed. Rep. 823; *Seixo v. Provezende*, L.R. 1 Ch. App. 192; *Cook v. Starkweather*, 13 Abb. Pr. (N. S.) 392; *Colman v. Crump*, 70 N. Y. 573; *Sohl v. Geisendorf*, 1 Wilson (Ind.) 60; *Mfg. Co. v. Trainer*, 101 U. S. 64. (5) When there is evidence showing in point of fact some persons have actually been deceived, although heedless, unwary and incautious, the evidence of other witnesses to the effect that in their opinion persons could not be deceived is of no value; and when one person has adopted the trademark of another, or a mark resembling it, and there is evidence, as here, of actual deception, that is to say, "that anyone has in fact been thereby induced to buy the defendant's goods as being the goods of the plaintiff, the question has been decided by the test of the facts, and the court will restrain the defendant

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without further inquiry." *Glenny v. Smith*, 2 DeG. & Sm. 476; s. c., 11 Jur. (N. S.) 964; *Woolam v. Ratcliff*, 1 H. & M. 259. "The best evidence of course would be instances of actual deception." *Cook v. Starkweather*, 13 Abb. Pr. (N. S.) 392–400. (6) Although the wholesalers or retailers to whom the defendant may have sold the tobaccos stamped with its mark may not have been deceived, yet if the consumer was deceived the right of action exists, and the permanent injunction should be granted. *Sykes v. Sykes*, 3 B. & Cr. 541; *Farina v. Silverlock*, 1 K. & J. 509; *Chappel v. Davidson*, 2 K. & J. 123; *Rose v. Loftus*, 47 L. J. Ch. 576; *Mfg. Co. v. Loog*, 18 Ch. Div. 412; *Crucible Co. v. Guggenheim*, 2 Brews. 321–325; *Mfg. Co. v. Wilson*, 2 Ch. Div. 434.

Fagg & Ball and *Gibson, Bond & Gibson*, for respondent.

(1) No trader can adopt a trademark so resembling that of another trader that ordinary purchasers buying with ordinary caution are likely to be misled. *McLean v. Fleming*, 96 U. S. 245; *Tobacco Co. v. Tobacco Co.*, 104 Mo. 53; *Filley v. Fassett*, 44 Mo. 168; *Mfg. Co. v. Trainer*, 101 U. S. 51; *McCartney v. Garnhart*, 45 Mo. 593; *Fish Co. v. Wooster*, 28 Mo. App. 408; *McCann v. Anthony*, 21 Mo. App. 83; *Sanders v. Jacobs*, 20 Mo. App. 95. (2) Where ordinary attention will enable purchasers to discriminate, the court will not interfere. *Ball v. Seigil*, 116 Ill. 137; *Reed v. Richardson*, 45 L. T. N. S. 54; *Beard v. Tannon*, 13 L. T. N. S. 746; *Leidersdorf v. Flint*, 50 Wis. 401; *Eggers v. Hink*, 63 Cal. 405; *Bell v.Lock*, 8 Paige, 75; *Stevens v. Deconto*, 7 Robertson, 343; *Talcott v. Moore*, 6 Hun, 106; *Pub. Ass'n v. Pub. Co.*, 51 How. Pr. 402. (3) The court is not bound to interfere where ordinary attention will enable purchasers to discriminate between trademarks used by different

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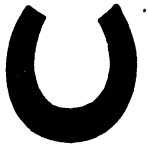
persons. *Popham v. Coal Co.*, 66 N. Y. 69; 82 N. Y. 519–523; *Partrige v. Menk*, 2 Sandf. Ch. 622; *Stokes v. Landgraf*, 17 Barb. 608; *Corben v. Gould*, 133 U. S. 308; *Tobacco Co. v. Finzen*, 128 U. S. 122; *Blackwell v. Wright*, 73 N. C. 310; High on Injunctions, sec. 1088; *Gilman v. Hunnewell*, 122 Mass. 139; Browne on Trade-Marks, sec. 33. (4) When trademarks are before the court, the true test of the alleged resemblance is inspection; and the evidence of witnesses is seldom resorted to. *Radam v. Destroyer Co.*, 16 S. W. Rep. 990; *Walton v. Railroad*, 40 Mo. App. 550–554; *Brewing Co. v. Brewing Co.*, 47 Mo. App. 14; *Cope v. Evans*, 22 Weekly Rep. (English) 453; Wharton on Evidence, sec. 436; Abbott's Trial Evidence, p. 752.

Rombauer, P. J.—The plaintiff, a tobacco manufacturer in the city of St. Louis, brought this action against the defendant, a tobacco manufacturer of Louisiana, Missouri, for the purpose of restraining the latter from using on plug tobacco manufactured by it any colorable imitation of a horseshoe, which is the plaintiff's trademark on that class of tobacco.

The petition states that, continuously since 1876, the plaintiff and its assignors used the mark of a horseshoe as a trademark for distinguishing certain plug chewing tobacco manufactured by them; that at first this mark was affixed to each one pound plug by way of a paper tag, but since the year 1879 it was affixed by way of a tin tag in the following form:



Which mark the plaintiff caused to be recorded in the United States Patent Office and in the county recorder's office of St. Louis. The petition further states that the

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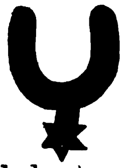
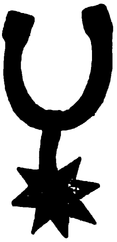
assignors of the plaintiff were the first in adopting said mark, and acquired by such adoption an exclusive right therein when affixed to plug tobacco; that the plaintiff's assignors and the plaintiff built up a very extensive trade in this article, which, owing to its tag, became generally known in the trade as horseshoe tobacco.

The petition then states that the defendant, well knowing the premises, thereafter commenced to manufacture and to sell on the same market where plaintiff was selling its said horseshoe tobacco a brand of tobacco, affixing thereto a tin tag (hereinafter designated as tag A) in the following form:



That said mark resembled a horseshoe, and that its use by the defendant was fraudulent and deceptive and designed to mislead the trade and public, and cause on their part the purchase of defendant's tobacco as and for the horseshoe tobacco of plaintiff; that, in 1889, the plaintiff complained to the defendant of said colorable imitation, and the defendant agreed to change its tags so as to avoid all probability of deception, and thereupon did change its tags to the following form (hereinafter designated as tag B):



That the plaintiff still complained of said tag B as an infringement of its trademark, and the parties sub-

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mitted the question to an arbitration of the executive committee of the Trade-Mark Association of Plug Tobacco Manufacturers, who made a unanimous award that tag "B" would deceive the *consumer* into the belief that the plug marked with it was horseshoe tobacco; that the defendant, being advised of the award of the committee, agreed with plaintiff that said tag "B" should be so altered as to be mutually satisfactory, but that the defendant has failed to make such alteration, and has continued to use said tag fraudulently ever since.

The petition further states, as indicating a fraudulent intent on part of the defendant, that the defendant also imitated the outward appearance of the boxes in which the plaintiff shipped its said horseshoe tobacco; that plaintiff once branded the horseshoe on the outside of its boxes in red, whereupon the defendant began to affix its simulated mark on the outside of its boxes in red; that the plaintiff then changed its brands to blue, whereupon the defendant immediately changed its brands from red to blue; and that the defendant in other respects is fraudulently using a label on boxes containing its tobacco in fraudulent imitation of the plaintiff's labels.

The plaintiff prays for a decree restraining the defendant from offering for sale any tobacco with the tag "B," or any other colorable imitation of plaintiff's horseshoe trademark attached thereto, and also for an account of the profits made by the fraudulent use of plaintiff's trademark. The damages are laid at $2,000.

The defendant's answer generally denies all the allegations of the petition, and specifically denies any fraudulent design on part of defendant to imitate the plaintiff's trademark. It avers that it did in good faith

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in the year 1879 adopt a spur as and for its trademark to be attached to certain kinds of plug tobacco of its own manufacture, and has used said trademark ever since. It denies that such spur is a colorable imitation of the plaintiff's horseshoe or was intended to be such, or that it is likely to deceive anybody. It admits that plaintiff did complain of the use of said mark by the defendant as a colorable imitation of its horseshoe, but it denies that the defendant agreed to submit the question, whether it was an infringement of plaintiff's trademark, to the Trade-Mark Association of Tobacco Manufacturers. It admits that it was informed that the question had been submitted to said association by the plaintiff, and that thereupon as a matter of courtesy it did authorize its tin tag or trademark to be exhibited to said association, with a proper representation of the facts connected with its use by defendant. It denies that it agreed to abide by the decision of the association, and denies that it ever agreed with plaintiff to cease using said trademark or to make such further changes in the form of the tag as should be mutually satisfactory. It denies the fraudulent imitation of the label on plaintiff's boxes, denies that its trademark ever interfered with that of plaintiff, and prays judgment.

The trial court upon a full hearing dismissed the plaintiff's bill.

For our convenience, all the original exhibits which have been used in the court below have been reproduced in the argument before us. We have carefully examined them, as well as the voluminous record of the testimony given at the trial, and find the facts to be as follows: The plaintiff's title to the use of the horseshoe trademark is not questioned. Its manufacture and trade in that particular brand of plug tobacco is very extensive, its out-put in 1889 being five million, seven hundred and seventy-eight thousand pounds; in

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1890, six million, one hundred and thirty-five thousand pounds, and in 1891, five million, four thousand five hundred and five pounds. The defendant's output of all brands of plug tobacco during the year 1890 seems to have been about one million, two hundred thousand pounds. The defendant is the successor of some firms and corporations, which in the main have consisted of the present stockholders of the defendant, and one of these firms (McCune, Palmer & Knight) in the year 1881 adopted the spur as a trademark, and attached to its navy plugs what purports to be a representation of a spur, by way of tin tags in the shape of tag "A," in the same manner in which the plaintiff's horseshoe tags were attached to its navy plugs, and of the same size, color and general appearance. The origin of the mark is stated by one of the defendant's officers to have been owing to the fact, that the defendant had an extensive trade in Texas, then the main cattle state, where the spur would be an attractive mark to cow boys and cattle men generally, although one of the defendant's witnesses, a very extensive cattle dealer, testifies that the spur in itself would not recommend the tobacco to cattle dealers more than any other brand. Before the firm of McCune, Palmer & Knight was absorbed in the defendant corporation, but about the same time as the spur brand was started, the defendant company adopted a "C" as a trademark, it not being clearly shown what the "C" was supposed to stand for, and placed tin tags supposed to represent that letter on its plug tobacco, which tin tags were colorable imitations of a horse shoe. The plaintiff at once complained of both these devices as infringements of its horseshoe mark, and the president of the defendant company gave to plaintiff upon request the following written declaration:

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"*To whom it may concern:* The plug chewing tobacco exhibited to us this day by M. G. Smith, attorney of the Drummond Tobacco Company, ***with the similitude of a horseshoe*** was made by us under the following circumstances: Thirty boxes only were made, when, discovering the similitude to the hoisešhoe, we have ceased making same, and will make no more in future. Our trademark is a little "c" which we claim is our own."

The defendant's evidence, however, furnishes no explanation why, if its trademark was a little "c," it attached to its plugs a capital "C," the similitude of which to the horseshoe, plaintiff's well-known trademark, the defendant at once conceded.

We further find that, upon plaintiff's complaint of the tag "A," a member of the firm of McCune, Palmer & Knight, who, however, is not now a member of the defendant corporation, called upon the plaintiff's then president, and some conversation was had in regard to avoiding deception by placing the defendant's tags differently on the plug than the plaintiff placed its tags, but that no definite arrangement for the settlement of the matter was arrived at. The defendant's boxes at that time were marked on the outside by a dark plug hat, represented as standing on the flat side of the plug of tobacco, a white spur being prominently displayed in the center of the hat. In the year 1889 the plaintiff's then president, while traveling on the Pacific coast, found in the trade there boxes of the defendant's spur tobacco, labeled on the outside in a manner resembling those of the plaintiff's horseshoe tobacco boxes, and containing in the inside the defendant's plug tobacco marked with tag "A." He at once made complaint by letter, to the secretary of the Trade-Mark Association above referred to, and the secretary in

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September, 1889, addressed a letter to the defendant as follows:—

"GENTLEMEN:—The Drummond Tobacco Company complain that the 'spur' tag used by you is so like their 'horseshoe' tag, that it is sold for 'horseshoe' to consumers. Please send us a plug with the 'spur' upon it, such as you sell, for comparison. Also what you have to say about their complaint. An early reply will oblige.

To this letter the defendant replied in the following manner: "As requested in yours of ninth instant, we send you by express to-day a plug of our 'spur' tobacco just as it goes to the trade. On comparing same with 'horseshoe' plug, we think your committee will agree with us that there is no reasonable ground for claiming that it is mistaken for that brand. There is a marked difference in spacing and manner of placing tags on the lump, which, with the wide difference between 'spur' and 'horseshoe' tags, makes it next to impossible to mistake one for the other. We have sold these goods quite largely throughout the South and West since '81, and not a single instance has come to our notice of this having been done. We will be glad to have you advise us of any decision your committee will arrive at in this matter."

The secretary at once sent the plugs of the plaintiff and the defendant to each of the members of the committee of arbitration, all of whom *seriatim*, and without any consultation as far as appears, gave it as their opinion that the defendant's so-called spur tag was likely to deceive the ordinary consumer of plug tobacco into the belief that it was the plaintiff's horseshoe tobacco he was buying. This award of the committee was at once communicated to the defendant.

We find that the Trade-Mark Association of Plug Tobacco Manufacturers is a voluntary association of

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plug tobacco manufacturers of the United States, which any manufacturer of the article may join. The assessments by which it is supported are based on the annual out-put of the article by its respective members. Its object is to protect its members in the use of their legitimate trademarks, and of defending them against infringements. It has an executive committee, selected by the members of the association annually, which acts as a committee of arbitration in case of any complaint for infringement made by one member against any other member, or against an outsider. The award of the committee is not conclusive on any member, but, if the controversy is between members of the association, the association, at its own expense, defends or prosecutes, as the case may be, any suit in the courts growing out of the infringement claimed so as to vindicate its award. The only difference between the rights of a member and non-member, in case of an award by the committee in favor of either, is that the non-member must vindicate the award of the committee at his own expense, which, in view of the fact that the non-member contributes nothing towards the support of the association, is natural. The members of the executive committee, as the evidence shows, are persons selected with a view to their competency to deal with the questions before them. Nor is there anything to indicate that it lies in their interest, or in that of the association, to make awards unsupported by the facts of the case, and thereby entail upon themselves and the association the costs of an unwarranted litigation. It was in evidence that in a recent controversy between a member and a non-member of the association the committee made an award in favor of the non-member.

When the defendant was notified of the award of the committee, two of its officers called upon the plaintiff to adjust matters. We find that the discus-

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sion at the conference turned upon the question how the spur should be represented on defendant's plugs so as to avoid the possibility of its being taken for the plaintiff's horseshoe. The plaintiff's president drew the representation of a spur which in his opinion could not be mistaken for a horseshoe, it being a spur with a very small band and a very large rowel. The defendant's officers agreed to have similar tags cut by hand and to submit them to plaintiff by letter, and claim that they did so, submitting the tag B. Plaintiff never received any such letter, and, noticing the marketing of the defendant's plugs with the tag B in the latter part of 1890, the plaintiff again complained to the secretary of the Trade-Mark Association of the alleged infringement, and the secretary at once wrote the defendant, advising it of that fact. The defendant, thereupon, wrote a long letter to the secretary, stating what had transpired since the last award, and also sent some of its plugs of tobacco marked with tag "B," claiming that tag "B" was radically different in form and general design from tag "A." This letter concluded:

"We do not believe that any unprejudiced man will say that the spur tag we now use is in any manner an infringement of the Drummond Tobacco Company's horseshoe, or calculated to deceive, and we are perfectly willing to have your executive committee pass on same."

The matter was again laid before the committee of arbitrators, who this time convened and sat as a body. The defendant was represented at that hearing by a person of its own selection. The committee again unanimously decided, each member giving his opinion *seriatim*, that tag "B" was an infringement of plaintiff's horseshoe tag trademark, and liable to deceive the consumer.

The defendant was at once notified of this decision, and refused to state whether it would abide by it.

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It replied under date of March 18, 1891, as follows:

"NEW YORK.

"*Theo. E. Allen, Secretary.*

"DEAR SIR:—Referring to your favor sixth inst., advising us of the decision of the executive committee in a matter of complaint of the Drummond Tobacco Company of our 'spur' tag, and asking if we will abide by said decision, will say one of our company has called on the Drummond Company with a view of making such change in the tag as will be mutually satisfactory, and the matter is now under consideration."

We find that thereupon an officer of the defendant company called upon the plaintiff's president and submitted to him a tag, cut out by hand, of zinc, of which the following is a *fac simile* (the same being hereinafter designated as tag "C"):

The plaintiff's president told the officer exhibiting the device to cut it out of tin, put it on the plugs in a box of tobacco, and send him the box of tobacco, as the defendant intended to put it upon the trade. This was never done, and the defendant continued to sell on the markets its tobacco, the same as theretofore, with the tag "B" attached thereto.

Two questions arise for decision upon this record: *First*. Is the defendant's tag "B," as now used and complained of, a sufficiently colorable imitation of plaintiff's horseshoe tag, likely to deceive the ordinary

consumer of the article; and, next, was the adoption and use of the spur tag by the defendant a mere matter of accident, or, if design, a design in good faith without any attempt at piracy upon plaintiff's trade in the horseshoe tobacco. If we conclude that the similitude between the two marks, *as at present used*, is not of a character likely to deceive any ordinary consumer of the article, the judgment dismissing the bill must be affirmed, even though the defendant was guilty of bad faith in the adoption of the symbol originally, because no action can be predicated upon fraud, unaccompanied with damages, even in equity. Courts deal with the principles of ethics only as far as they affect property rights.

It is not claimed, either in the bill or in the evidence, that the similitude between the two tags is likely to deceive either the jobber or retailer. These persons buy the article in larger quantities; it is billed to them as an article of a certain kind; they have ample opportunity of close examination; and, hence, their deception by any simulated trademark, short of a downright forgery, is out of the question. The consumer of the particular article is to be considered almost exclusively in determining the question of infringement, because, in the case of an attempted deception, he is substantially the only party likely to be deceived. *Sykes v. Sykes*, 3 B. & Cr. 541; *Farina v. Silverlock*, 1 K. & J. 509; *Rose v. Loftus*, 47 L. J. Ch. 576; *Singer Mfg. Co. v. Loog*, 18 Ch. D. 395, 412.

It is a notorious fact, amply supported by the evidence in this case, that consumers of plug tobacco consist in the main of persons engaged in manual labor, who purchase the article without close scrutiny, and mostly in small quantities, known as ten-cent cuts, and that it is for this reason that the little tin tag is attached to the plugs in short intervals so as to show

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one on each ten-cent cut. The evidence further shows that this class of purchasers generally call for the article by the brand, and cannot give a very critical examination to the tag, as they have neither the means of comparison nor the facilities for careful examination.

It is not essential to the right of relief to show that anyone was actually deceived. *Filley v. Fassett,* 44 Mo. 168. The evidence in this case however shows, and we so find, that some purchasers were actually thus deceived, the retailer handing them defendant's spur tobacco when they called for the plaintiff's horseshoe, and that the similitude in the external appearance of the boxes and the general appearance of the tag was such that, in two instances, even the plaintiff's salesmen were deceived by looking at the boxes from some distance. There is ample and credible testimony, offered by the plaintiff by way of expert opinion on the part of salesmen and others, of a likelihood of deception, and such testimony finds corroboration in the award of the executive committee of the Trade-Mark Association, whose competency to pass upon the question as experts is conceded in the defendant's letter of February 20, 1891.

The defendant's counsel urge with zeal and learning that the question of similitude is after all a question of mere inspection, and, as all the exhibits used upon the trial are before us, we have the same facilities for determining the question as the witnesses examined and the committee of arbitration had, and that we should pass our judgment upon the evidence of inspection. That the main test of the alleged resemblance is inspection, has been frequently decided (Abbott's Trial Evidence, 752), but it has also been decided with equal uniformity that the resemblance need not be such as would deceive persons seeing the two marks side by side. *Seixo v. Provezende,* 1 Ch. App. Cas. 191, 195;

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Colman v. Crump, 70 N. Y. 573, 578; *Hier v. Abrahams*, 82 N. Y. 519; *Pike Mfg. Co. v. Stone Co.*, 35 Fed. Rep. 896; *McCann v. Anthony*, 21 Mo. App. 83. The rule is similar whether the alleged infringement relates to a trademark, trade label or trade name, as the underlying principles are the same. The court cannot upon bare inspection determine whether an ordinary customer, having neither the opportunity for comparison nor time for examination, would likely be deceived by the similarity of the marks. On that question the opinion of witnesses familiar with the trade, and the habits of the customer, is of weight, and, when aided by evidence of instances of actual deception, should be controlling, unless the dissimilarity between the two marks is such as to exclude any probability of deception. Guided by these considerations, we conclude that the plaintiff's evidence makes out a *prima facie* case that the defendant's so-called spur tag "B" is, under the circumstances shown in evidence, an infringement of plaintiff's trademark of the horseshoe tag.

This brings us to the second and not less important part of the inquiry, whether the adoption of the spur tag by the defendant as a trademark was a mere matter of accident, unaccompanied by any design of illegal encroachment on the plaintiff's trade. We go into the inquiry, owing to the voluminous evidence adduced by defendant tending to show that the similitude between the two tags is not such as to *deceive any person using ordinary caution*, and hence no serious injury has resulted or can result to plaintiff's proprietary rights by the alleged interference. We state at the outset that, while fraud on defendant's part is in no way essential to protect plaintiff's proprietary rights in the trademark from interference when the interference is made out by the unequivocal proof, yet less cogent proof of the probability of deception will suffice where an intention to deceive

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is shown. The merchant or manufacturer, who by an unfortunate accident adopts a trademark already in use by another, occupies in a court of conscience a different position from one who, knowing of the other's trademark, and designing to profit by the reputation established through the efforts of another, seeks to get part of the benefit of the trade and reputation of the other by means of a colorable imitation of his trademark. Fraud was the very origin of the exercise of jurisdiction of courts of equity in this class of cases. This distinction is obvious, and has been frequently recognized. Browne on Trade-Marks, sec. 202. *McLean v. Fleming*, 96 U. S. 245; *Curtis v. Bryan*, 2 Daly, 312; *Edelsten v. Vick*, 11 Hare, 78. "The finding of a fraudulent design must in itself, to some extent at least, influence the finding of the court as to the similarity of the imitation, because, whenever the similarity is such as may probably deceive, it comes with ill grace from the defendant to say that he intended to deceive but failed because the resemblance was not close enough. If either party is entitled to the benefit of a presumption in the case above stated, it is the plaintiff and not the defendant." *The American Brewing Co. v. Brewing Co.*, 47 Mo. App. 14, 22. We have announced and acted upon this rule in many cases. *Sanders v. Jacob*, 20 Mo. App. 96; *McCann v. Anthony*, 21 Mo. App. 83; *Trask Fish Co. v. Wooster*, 28 Mo. App. 408, 419; *Plant Seed Co. v. Plant & Seed Co.*, 23 Mo. App. 579.

As bearing upon this question, we find the facts to be as follows: All the different firms and corporations, which by succession now form the defendant company, were all along familiar with the plaintiff's horseshoe trademark, and knew that the tobacco marked with the horseshoe tag, and known as horseshoe tobacco, had an extensive reputation. With full knowledge of that

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fact, the firm of McCune, Palmer & Knight, defendant's assignor, adopts a spur as a trademark, and places a tin tag purporting to represent a spur upon their plug tobacco in exactly the same manner as the plaintiff's is placed, and creasing their tobacco in the same manner as the plaintiff's is creased. The representation of this so-called spur has a short shank, the tag exhibiting the flat side of the band of the spur and of the shank and rowel, which we need not say is an impossible representation of a spur from any point of view. Plaintiff complains of this tag as an infringement, and the firm promises to remedy matters so as to avoid deception. Shortly afterwards the defendant corporation places upon its tobacco a tag in the shape of a capital C, and, when the plaintiff complains of it as an infringement, it at once admits that this tag is a similitude of plaintiff's horseshoe, and desists. The defendant, having by this time acquired the spur brand from the firm of McCune, Palmer & Knight by assignment, does away with the outside box label of the spur tobacco used by McCune, Palmer & Knight, namely a black hat with a white spur across it, and places on the outside of its boxes a label of a plug crossed with a spur in the identical manner in which the plug on the label used on plaintiff's boxes is crossed by a horseshoe. No explanation of how this change came to be made is given, nor is any satisfactory explanation given why the color of the branded spur on the outside box is changed so as to correspond with the color of plaintiff's boxes containing the horseshoe tobacco. It is highly improbable that all these coincidences are results of mere accident, and, in the absence of any satisfactory showing that they were the results of accident, we must conclude that they were the result of a deliberate design to obtain part of the benefit of the reputation acquired by the article manufactured by plaintiff through the

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means of a colorable imitation of its distinguishing mark.

It is also shown by the evidence of disinterested witnesses (and, although this evidence is contradicted by the defendant, we find the occurrences probable) that the defendant's traveling salesmen, in pushing the spur tobacco in the market, designated it as the new horseshoe or spur, they being offered special inducements for pushing this particular brand. We also find that, in isolated instances, such salesmen suggested to the retailers that, on cutting the plug into five-cent pieces and thereby severing the spur tag, there would be left a horseshoe on one piece and on the other a star, and that some retailers availed themselves of the suggestion. The star brand of tobacco, on which the star is somewhat similar to the rowel on the spur tag, was and is a favorite brand in the western market. It is the same trademark, the infringement of which by a fraudulent and spurious imitation, called the "buzz saw," was perpetually enjoined by the supreme court of this state in *Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co.*, 104 Mo. 53. That the Sam Reid above named, as is shown by the evidence, is a former bookkeeper of the Tinsley Tobacco Company, a son-in-law of Addison Tinsley, and is the party who was selected to represent, and who did represent, the defendant in the arbitration had before the Trade-Mark Association in the case at bar, is also an unfortunate coincidence.

We recite these minor facts, not because we consider they would be entitled to consideration if standing alone, but, because, in the aggregate, they are entitled to some weight in connection with the other facts in determining the defendant's good faith in the premises.

It results from the foregoing that the judgment of the trial court, dismissing the bill, must be reversed. The only remaining inquiry is, what judgment we

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should render under the statute, which commands us to render such judgment as the trial court should have rendered.

The plaintiff's bill contains a prayer for general relief. It also contains a prayer for specific relief as follows:

"That said defendant, its agents, servants and employes may be perpetually enjoined and restrained from manufacturing, selling (or offering for sale), directly or indirectly, any plug tobacco having affixed thereto the mark of a 'horseshoe,' not the genuine mark of plaintiff, or the mark used by defendant and heretofore last described, or any other colorable imitation of plaintiff's 'horseshoe' tobacco trademark as hereinbefore stated, which has made plaintiff's tobacco known by the name of 'horseshoe' tobacco.

"That defendant may be compelled to render before this court a full, true and perfect account of all profits of every description which it has made by use of the simulated mark aforesaid, and that the said defendant may be decreed to pay over to plaintiff all such profits."

We shall grant no relief to plaintiff under its prayer for an account in this proceeding. The facts that for many years the defendant has used the spur tag in various shapes and forms, and for part of the time without any active objection on part of the plaintiff, and that different changes were introduced in its shape and general appearance, in the various attempts to settle the matter amicably, raise propositions which make it difficult to determine the exact data which form the elements of such an account, even if plaintiff were entitled to it. Hence, without prejudice to plaintiff's rights, we shall make no order on that part of the plaintiff's bill, leaving it at liberty, if so advised, to proceed at law for damages. We, however, decree that

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the defendant, its servants and agents be perpetually enjoined from marking either the plug tobacco manufactured by them, or the outside of the boxes in which such tobacco is shipped and exposed for sale, with the tag hereinabove mentioned as tag B, or any other colorable imitation of plaintiff's horseshoe trademark; the defendant to be at liberty to use for that purpose, if they so desire, tag C, both on their plugs of tobacco, and on an outside label of their boxes, and, if used on the outside labels of their boxes, the spur to be placed lengthwise on the plug, or else in some other manner distinct from the relative positions of the plug and horseshoe on plaintiff's boxes. So ordered. Judge THOMPSON concurs. Judge BIGGS does not participate in the decision.

ON MOTION FOR REHEARING.

THOMPSON, J.—The motion for rehearing which has been filed in this case is not authorized by any existing rule of the court. It merely proceeds on the ground that the court, in weighing the evidence, has decided the cause erroneously, and upon that assumption it asks for a rehearing. This court has, however, always been ready to waive its rule and to grant a rehearing in any case where it has become satisfied that it has committed a mistake, and it has always been glad when counsel would point out its mistakes. The conclusion of the oral argument in this cause left me with the distinct impression, that the device of the spur, as adopted and used by the defendant corporation and its predecessors as a trademark, was adopted, devised and used with the purpose of pirating the trademark of the plaintiff; but I had serious doubts whether the defendant's trademark, in the modified form in which it was used at the commencement of this action, had sufficient resem-

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blance to the trademark of the plaintiff to deceive even the incautious and unwary among the retail purchasers of this species of goods. With both of these questions in mind, I have examined this record with great care, reading every line of it, and especially making examinations of those portions to which our attention has been invited on the part of the defendant. These examinations have confirmed the impression which I acquired at the argument, that the defendant's trademark of the spur has been adopted and used with the design of obtaining advantage from the reputation of the goods sold by the plaintiff under its trademark of the horseshoe. Upon this question I have no doubt at all. To my mind the stress of the case, if there is any, lies in the question whether the design of the spur, as at present used by the defendant, referred to in the opinion of the court as tag B, is of such a nature as to deceive even the incautious and unwary among the retail purchasers of chewing tobacco. I say the incautious and unwary, because I am of the opinion that, where a tradesman has adopted a trademark with the deliberate purpose of deceiving and infringing the trademark of another, and deriving profit from the reputation of the goods of that other, it is sufficient, if the similitude between his trademark and the trademark of that other is sufficient to deceive the incautious and unwary and that it is not necessary, to entitle the other party to injunctive relief, that the resemblance should be so close as to deceive purchasers exercising ordinary care and prudence. The plain reason is that many persons are incautious and unwary; and, hence, equity will not permit one tradesman fraudulently to adopt such a device as will enable him to abstract a portion of the trade of another by diverting to himself the incautious and unwary among the customers of that other. This was the

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ground on which this court proceeded in the decision of the case of *Sanders v. Jacob*, 20 Mo. App. 96. In that case the plaintiff had devised a sign to designate his business of a dentist the words "New York Dental Rooms," and the defendant, with the purpose of deflecting from the plaintiff some of his trade, opened a dental establishment near that of the plaintiff under the name and sign of the "Newark Dental Rooms." Here it was obvious that, there was, no such similitude between the two trade names, as would deceive careful and prudent people. It was equally obvious that there was such a similitude as would deceive the incautious and unwary, and there was evidence that such persons had been deceived. We, therefore, held it a case in which the defendant ought to be enjoined from the use of the word "Newark" in connection with his dental rooms. So in this case, while the evidence for the defendant, upon the general question of the probability of the defendant's spur tag, as at present used upon its tobacco, deceiving purchasers, preponderates over the evidence of the plaintiff, yet the evidence of the plaintiff, delivered by the mouth of expert and credible witnessess, is to the effect that the defendant's device has a tendency to deceive retail purchasers; and the plaintiff has further adduced evidence, which we are not at liberty to disregard, that in some cases it has had that effect. As there has been, in my opinion, a plain attempt on the part of the defendant to infringe the trademark of the plaintiff, I do not think that they are in such a position as to require us to say, in the face of this evidence, that their attempt has not been successful, and is not likely to be successful. Besides, it is to be borne in mind that the evidence adduced by them, except that which belongs to the domain of opinion evidence, is of a negative character. It consists of the testimony of dealers in various places, that they have

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known of sales of both brands of tobacco, and have not known of customers being deceived by the similitude of the two trademarks. Such evidence might be multiplied almost indefinitely, and yet it would have only a persuasive effect in rebutting distinct evidence to the effect that purchasers had been so deceived in other places and under other circumstances. If I could bring my mind to the conclusion that the defendant's trademark had been innocently adopted, I should not be prepared to say that there is a sufficient similitude, or upon the evidence a sufficient probability of confusion, between the plaintiff's trademark and that of the defendant, to warrant injunctive relief.

We are further asked to transfer this cause to the supreme court, on the ground that there is an amount in controversy in excess of the pecuniary limit of our jurisdiction. We could not stultify ourselves by making such an order now, after hearing and deciding the cause on its merits, unless plainly convinced by some new suggestions that we were wrong in taking jurisdiction in the first instance. The only suggestion supporting this contention is that there is evidence in the record on the part of the defendant that it and its predecessors have expended far more than $2,500, the pecuniary limit of the jurisdiction of this court, in advertising its brand of tobacco, known as the spur tobacco. One member of the defendant corporation testified that, if he had the money that had been expended, he would be willing to retire from the tobacco business, and another testified to the belief that the amount so expended was more than $10,000; but neither of them could give even an approximate amount. Assuming that it was more than $10,000, yet that fact does not furnish any ground for ousting the jurisdiction of this court. Our decree does not prohibit the defendant from advertising its brand known as the

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spur tobacco. It merely prohibits it from advertising it by a device in the similitude of the device adopted by the plaintiff in advertising its horseshoe brand. Moreover, it expressly leaves it at liberty to use the device referred to in the opinion as tag C, the same being substantially the device which it, on the last conference with the plaintiff, agreed to adopt, as we find from the evidence, but which it failed to adopt. Our decree does not, therefore, suppress the defendant's trademark at all, nor confiscate the property which it has in it, nor deprive it of the fruits of the moneys it has expended in advertising the brand designated by it; but it merely requires it to make such a change in its device, as will not deceive customers into the belief that its tobacco is the brand known as the horseshoe brand of the plaintiff, and it leaves it at liberty to adopt, in designating its brand of goods, the device which it proposed to the plaintiff to adopt.

The motion for rehearing, and the motion to transfer the cause to the supreme court for want of jurisdiction, are both overruled. Judge ROMBAUER concurs. Judge BIGGS does not participate in the decision of these motions.

WILLIAM M. SMITH, Respondent, v. THE CITIZENS RAILWAY COMPANY, Appellant.

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St. Louis Court of Appeals, December 13, 1892.

1. **Street Railways:** CONTRIBUTORY NEGLIGENCE OF TRAVELER INJURED ON HIGHWAY. When a traveler on the streets of a city approaches a street railway operated by cable—in this cause he knew that the railway was being thus operated—it cannot as a matter of law be ordinarily regarded as his duty to stop, but he is bound to make a fair exercise of his faculties before driving upon a point of danger, and, to this end, he is bound to listen for the customary signal, and to look for the approach of trains unless his view is obstructed, and a failure so to do will constitute contributory negligence upon his part, if he is injured in consequence.

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2. ——: ——: LIABILITY OF STREET RAILWAY COMPANIES. Notwithstanding such contributory negligence on the part of the injured traveler, the street railway company will be responsible for injury caused to him through a collision with one of its trains, if the person in charge of such train saw him in time to have averted the injury, or, by the exercise of ordinary and reasonable care in keeping a lookout in front of him, might have discovered him at the point of danger in time to have avoided the injury. But *held* that the evidence in this cause did not establish such ground for liability.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

REVERSED.

Smith P. Galt, for appellant.

M. McKeag, for respondent.

THOMPSON, J.—This action was commenced before a justice of the peace to recover damages for injuries received by the plaintiff in a collision with one of the cars of the defendant's railway. On trial anew in the circuit court before a jury, the plaintiff had a verdict and judgment for $45, and the defendant prosecutes this appeal. This verdict was, beyond all question, a compromise verdict, as the plaintiff proved actual expenditures by reason of the injuries to the amount of $76, and there was no countervailing evidence. He also proved that he was laid up eight days by reason of the hurt. We have come to the conclusion, after reading the record, that the case must be disposed of on the assignment of error that the court, at the close of the whole case, should have directed the jury that the plaintiff could not recover.

The defendant is a corporation operating a street railway on Morgan street in the city of St. Louis, propelled by the well-known underground cable by means of a grip extending down to it through a slot fixed in

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the street. At the place where the collision took place its customary and limited rate of speed was eight miles an hour. The plaintiff was a merchant engaged in the sale of hardwood lumber in the city of St. Louis, having a half interest in a partnership firm engaged in that business, the volume of the trade of the firm being about $1,000 a day. The plaintiff was in the habit of driving in a buggy over the streets of St. Louis, and had been for many years. He had been accustomed to drive horses ever since he was a boy. He had driven the horse, which he was driving at the time of the collision, for two or three years, and there was no evidence tending to show that the horse was not ordinarily gentle, tractable and roadwise. In the daytime, in a top buggy, the top of which was partly thrown back so that the sides did not obstruct his view, he was driving northward on Eleventh street, at the intersection of that street with Morgan street. His rate of speed was about five miles an hour and was a trot, as described by himself—or a dog-trot, as described by one of his witnesses. Morgan street is fifty feet wide from one building line to another, and thirty feet wide from curb to curb, and the defendant's railway is a single track railway running along the center of Morgan street. As the plaintiff approached the intersections of the two streets, a train of the defendant's cars approached the same intersection from the west. The plaintiff and three of his witnesses testified that they did not hear the customary signal, which consisted of the ringing of a bell or striking of a gong by the gripman; and one of the plaintiff's witnesses stated that he was looking at the gripman, and would have seen him if he had given the signal. The evidence adduced by the defendant, on the other hand, was to the effect that the signal was given in the customary way, and at the usual distance from the point of intersection, to-wit,

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fifty to one hundred feet. The plaintiff's case, made by his own testimony, was that, knowing there was a cable railway on Morgan street, and listening for the customary signal, which is given by such railways on approaching the crossing of another street, not only in this but in other cities, and not hearing the signal, he was not apprehensive of an approaching train and drove forward. When at the point where he, sitting in his buggy, was about twenty feet from the defendant's track, and when the head of his horse was about ten feet from the defendant's track, he saw the train approaching at a distance from him of twenty to thirty feet. He claims that he could not have seen it at an earlier period. He also claims that at the gait at which his horse was going it was impossible for him to stop his horse, and, therefoie, the only thing he could do was to whip up his horse and endeavor to get across the track ahead of the train. This he attempted to do, but, while clearing the track, the rear of the buggy was struck by the gripcar and he was thrown out, and the buggy and harness were injured. One of the plaintiff's witnesses testified to the effect, that the gripman did all that he could to avert the injury after seeing the plaintiff driving across the street in front of him; that he threw both brakes—the wheel brake and the track brake—and endeavored to stop his car in the shortest possible space of time.

The plaintiff, at the outset of his narrative on the witness stand of the way, in which the collision happened, laid stress on the fact of his listening for the signal, but did not say anything about looking for the approaching train. It was only when his attention was directed to the matter of looking, and chiefly on his cross-examination, that he claimed that, by reason of the obstruction of buildings, he could not have seen it sooner than he did. The undisputed physical facts

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contradict this statement, and conclusively contradict it. The defendant's superintendent took accurate measurements of the ground, including the width of the street, and testified that, at the distance of thirty feet south of the center of the central point of the intersection of Eleventh and Morgan streets, a person looking westward up Morgan street could see to the distance of two hundred and twenty-two feet, and that at a distance of thirty-five feet south from this point of intersection the vision was unobstructed up Morgan street so that a train could be seen to the distance of one hundred and five feet. No attempt was made to contradict this testimony, and it accords with the obvious physical facts when a statement of the width of Morgan street is given.

It has long been settled in this state and elsewhere, in cases where travelers have received injuries from collision with steam railway trains at crossings, that it is the duty of the traveler to exercise his faculties on approaching such a crossing, that is, to look and listen. Our supreme court has gone even further, and has in several cases established the rule that it is the duty of the traveler to *stop*, look and listen, and, if he fails to do this and collides with an approaching train, he is precluded from recovering damages by reason of his contributory negligence, although the servants of the railway company in charge of the train may have failed to give the customary or statutory signal on approaching the crossing. *Henze v. Railroad*, 71 Mo. 636; *Zimmerman v. Railroad*, 71 Mo. 476; *Drain v. Railroad*, 86 Mo. 574; *Lenix v. Railroad*, 76 Mo. 86; *Stepp v. Railroad*, 85 Mo. 229. The duty of *stopping* is not an obligatory duty under all circumstances (*Kelly v. Railroad*, 88 Mo. 534), and for obvious reasons we are of opinion that it cannot be regarded, as a matter of law, as ordinarily the duty of a traveler on the streets of the city of

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St. Louis when approaching a cable railway. But such a traveler is bound to make a fair exercise of his faculties before driving upon a point of danger, and, to this end, he is bound to listen for the customary signal, and to look for the approach of trains unless his view is obstructed. As we regard it as indisputable upon the evidence that the plaintiff's view was not obstructed so as to prevent him from seeing the train in time to have stopped before he drove upon the track, we regard it down to that point as clearly a case of concurrent negligence, even on his own testimony, as between him and the gripman driving the train. The gripman failed to give the customary signal, if the plaintiff's evidence is true, and the plaintiff failed to make the proper use of his faculties; and both he and the gripman proceeded forward, both of them actively to the point of contact. This makes a case of concurrent negligence, concurring in point of fault and concurring in point of time, in which case the law is well settled that the person suffering damage cannot recover.

A circumstance which will take the case out of this rule may exist, where the person sustaining the damage reaches the place of danger and is there discovered by the person in charge of the approaching train in such time that such person, by the exercise of ordinary and reasonable care, might have averted the injury; or where, if such person were exercising ordinary and reasonable care in keeping a lookout in front of him, he might have discovered the traveler at the point of danger in time to have avoided the injury. *Bergman v. Railroad*, 88 Mo. 678. The duty of the ordinary traveler approaching the crossing of an electric street railway thus to look and listen, and the corresponding obligation of the driver of the train to use reasonable care and exertion to avoid injuring him after discovering him in a position of danger on the

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track, and the liability of the company in the case of the failure of the driver of the train to discover him in his position of peril by the exercise of that ordinary care which is incumbent upon him, were declared by this court in the recent case of *Hickman v. Railroad*, 47 Mo. App. 65.

Now the evidence, taken as a whole, fails to show that the gripman of the defendant's train did not exert himself as well as he could to prevent the collision, as soon as he perceived that the plaintiff was attempting to drive across the track immediately in front of the train. It must be remembered, according to the plaintiff's testimony, that the plaintiff whipped up his horse and attempted to drive rapidly in front of the gripcar at a time when the head of plaintiff's horse was only ten feet from the railway track. It was snowing at the time, though there is no evidence as to the condition of the tracks. There was evidence that a series of experiments had placed the distance at which trains can be stopped under various circumstances at from seventeen to forty feet, and, as the grade was a little downward at that point going east, the evidence of the defendant's superintendent was that a gripman would do well if he could stop his train at a distance of twenty-five feet with either snow on the track or a wet and slippery track; and there was no countervailing evidence. No one, we think, can read this record without getting in his mind a very clear image of a catastrophe, which many accustomed to ride on these gripcars have seen and which may have been familiar to most of the jurors. The gripman, approaching a crossing, sees a traveler driving across the cross street toward the point of intersection. He has the right to conclude that the traveler will not be so foolhardy as to run immediately in front of his train, and so in substance the court instructed the jury in this case.

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When he reaches a point so near the traveler, that the distance between them is estimated at from twenty to thirty feet and the head of the traveler's horse is but ten feet from the track, the traveler whips up his horse and endeavors to cross the track in front of him. The gripman, at the same time, throws both his brakes and does all he can to avoid a collision. He nearly succeeds in stopping his train before it comes in contact with the traveler's vehicle. This does not make a case, where the ends of justice are subserved by allowing a jury to say that the railway company has been in fault and ought to pay damages.

The judgment of the circuit court will accordingly be reversed with the concurrence of all the judges.

Pauline Reichla, Respondent, v. Louis Gruensfelder, Appellant.

St. Louis Court of Appeals, December 20, 1892.

1. **Action by Wife for Death of Husband:** ESTOPPEL: RELIANCE ON REPRESENTATION. Where a mother acts as next friend for her children in an action by them for the death of their father, the fact that the petition alleges that the mother has failed to sue within the period of six months, to which her right of action is limited, will not estop the mother from denying the truth of that allegation in proceedings on her part against the same defendant, if the defendant has not acted upon the allegation to his prejudice, as where there has been neither compromise of the action of the children, nor a judgment therein against the defendant.

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55	406
55	494
52	43
58	329
52	43
76	433
52	43
83	120
52	43
92	117

2. **Master and Servant:** NEGLIGENCE OF MASTER: SUFFICIENCY OF THE EVIDENCE. The evidence in this cause is considered, and is *held* adequate to warrant a recovery for negligence of the master in furnishing to the servant defective appliances and insufficient accommodations and quarters for the doing of work attended by risk.

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3. ———: EXTENT OF OBLIGATION OF MASTER. The obligations of the master towards his servant require him to furnish not only suitable tools and appliances and competent fellow servants, but also a reasonably safe place for the doing of the work demanded of the servant.

4. ———: OBVIOUS DEFECTS: RISKS ASSUMED BY SERVANT. When a servant is engaged in work under the orders of the master, and is injured in consequence of obvious defects in the instrumentalities furnished therefor, the master is responsible for the injury only upon proof either that the danger attending the execution of the master's orders was not fully appreciated by the servant owing to the want of time for consideration, or that the increased danger by reason of the defective agencies was not so imminent and threatening as to require the servant to abandon the service.

5. ———: OBLIGATION OF MASTER TO FENCE DANGEROUS MACHINERY. Even in the absence of a statutory provision for the fencing of dangerous machinery the obligation, which the law imposes upon the owner of the premises to guard persons lawfully there against pitfalls, may be applied between a master and his servant, and a failure to comply therewith may under the circumstances of particular cases warrant the inference of negligence.

6. ———: ———: EFFECT OF GENERAL PRACTICE. When such fencing can be resorted to without inconvenience, and its absence renders the machinery unnecessarily dangerous, the existence of a practice to use the machinery without it will not prevent the inference of negligence.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

REVERSED AND REMANDED.

C. P. & J. D. Johnson, for appellant.

(1) The trial court erred in sustaining the demurrer to that portion of the answer which pleaded an estoppel. Revised Statutes, secs. 1997, 2000, 2003, 4425–4427; Bigelow on Estoppel, pp. 553, 697, note 3; *Chilton v. Scruggs*, 5 Lea, 316; *Hilton v. Zimmermann*, 5 Sneed, 40; *Bank v. Warrington*, 40 Iowa, 528; *Crout v. Tremble*, 66 Ill. 428; *McEwin v. Jenks*, 6 Lea, 291; *Cooley v. State*, 2 Head, 606; *Cheney v. Selma*, 71 Ga. 384; *Anderson v. Clark*, 70 Ga. 367. (2) The court

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below erred in not giving the defendant's instruction for a nonsuit offered at the close of the evidence for plaintiff, and in refusing to give the same instruction when offered after all the evidence was in. Wood's Law of Master & Servant [2 Ed.] secs. 326, 335, 372, 382, pp. 675, 682, 758; *Renfro v. Railroad*, 86 Mo. 302; *Price v. Railroad*, 77 Mo. 508; *Porter v. Railroad*, 71 Mo. 66; *Keegan v. Kavanaugh*, 62 Mo. 256; *Aldridge v. Midland*, 78 Mo. 559; *Cummings v. Collins*, 61 Mo. 520; *Lewis v. Railroad*, 59 Mo. 495; *Covey v. Railroad*, 86 Mo. 635; *Lela v. Railroad*, 82 Mo. 430; *Nolan v. Shickle*, 3 Mo. App. 300. (3) The instruction given by the court below, on its own motion, is erroneous, in that it was not supported by the evidence; it submitted to the jury issues which there was no evidence to sustain; it submitted to the jury a question of law; it ignored the evidence tending to show that the alleged defects in the instrumentalities, around and with which deceased worked and which occasioned his death, were open to the most casual observation, and that it did not require any skill or unusual intelligence to see or learn of the same; it contained abstract propositions of law; it erroneously submitted to the jury the question of contributory negligence upon the part of the deceased; it assumed that the deceased was inexperienced and was assigned to a duty for which he was unfitted, and which involved unreasonable risks. *Duke v. Railroad*, 99 Mo. 351; *Music v. Railroad*, 57 Mo. 134; *White v. Chancy*, 20 Mo. App. 397; *Cottrell v. Spiess*, 23 Mo. App. 35; Whitaker's Smith on Negligence, 40; *Albert v. Besel*, 88 Mo. 150; *Jordan v. City*, 87 Mo. 673; *Railroad v. Cleary*, 77 Mo. 628; *Hudson v. Railroad*, 53 Mo. 539; *Bank v. Westlake*, 21 Mo. App. 365; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Hoffmann v. Parry*, 23 Mo. App. 20; *Rigdon v. Trumbo*, 52 Mo. 35; *Budd v. Hoffheimer*, 52 Mo. 297; *Porter v. Harrington*,

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52 Mo. 524; *Wyatt v. Railroad*, 62 Mo. 411; *Matthews v. Railroad*, 26 Mo. 89; *Wilkerson v. Thompson*, 82 Mo. 317.

Dodge & Mulvihill and *Leonard Wilcox*, for respondent.

(1) There was no error in the action of the court in sustaining the demurrer to the part of the answer of the appellant. The doctrine of estoppel does not apply to this case. Plaintiff had a cause of action for the negligent killing of her husband, and, having once appropriated it by filing suit within six months, all others were forever barred from so doing. Revised Statutes, 1889, secs. 4425, 4426, 4427; *McNamara v. Slavens*, 76 Mo. 331; *Shepherd v. Railroad*, 3 Mo. App. 550; *Tate v. Jacobs*, 47 Mo. App. 218. (2) The defense of contributory negligence was not properly pleaded by appellant, and his instructions founded on that defense were properly refused. No question of contributory negligence can arise until there is evidence of defendant's negligence. *Fugler v. Bothe*, 43 Mo. App. 51-58; *Young v. Shickle*, 103 Mo. 324-328; Whitaker's Smith on Negligence, 374; *Gurley v. Railroad*, 93 Mo. 445-50; *Shortel v. St. Joseph*, 104 Mo. 114-120; *Schultz v. Moon*, 33 Mo. App. 329. (3) There was ample proof of each of the six acts of negligence submitted to the jury, and the question being one of fact is not reviewable by this court. *Bishop v. Hunt*, 24 Mo. App. 373. (4) Unless the court can say as a matter of law that the appellant, although he may have been guilty of the acts charged, exercised such care as a man of ordinary prudence would exercise under the same circumstances, the case was properly submitted to the jury; but the court cannot say this, because, to say the least, it is a question about which reasonable minds may differ.

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Norton v. Ittner, 56 Mo. 351; *Staples v. Canton*, 69 Mo. 592; *Loewer v. Sedalia*, 77 Mo. 431–444; *Whalen v. Church*, 62 Mo. 326; *Schultz v. Moon*, 33 Mo. App. 329–340; *Buesching v. Gas Co.*, 73 Mo. 219–230; *Soeder v. Railroad*, 100 Mo. 673; *Hudson v. Railroad*, 32 Mo. App. 667–676; *Walsh v. Railroad*, 102 Mo. 582–587; *Witting v. Railroad*, 101 Mo. 631–641; *Campbell v. Eveleth*, 83 Me. 50; 21 Atl. Rep. 784; *McElligott v. Randolph*, 22 Atl. Rep. 1094; *Railroad v. McDade*, 10 Sup. Ct. Rep. 1044; *Reagan v. Railroad*, 93 Mo. 348–352; *McCarragher v. Rogers*, 120 N. Y. 526; *Indermaur v. Dames*, 1 Thompson on Negligence, 295; *Hays v. Gallagher*, 72 Pa. St. 136; *Railroad v. Stout*, 17 Wall. 657–663; *Williams v. Railroad*, L. R. 9 Ex. 157; *Flynn v. Bridge Co.*, 42 Mo. App. 529. (5) This is a complete answer to defendant's point that the court should have told the jury what facts, if proved, amounted to negligence. In this case, negligence was a mixed question of law and fact, and the court having told the jury that the defendant was bound to use ordinary care left it to the jury to say what was ordinary care. *Kane v. Railroad*, 128 U. S. 91; *Campbell v. Eveleth*, 83 Me. 50; 21 Atl. Rep. 784; *Guthrie v. Railroad*, 81 Me. 572–579; *Nugent v. Railroad*, 81 Me. 62–70; *Jones v. Railroad*, 128 U. S. 443; *Drain v. Railroad*, 86 Mo. 574; *Clay v. Railroad*, 24 Mo. App. 39–47; *Tabler v. Railroad*, 93 Mo. 79–86.

Biggs, J.—The plaintiff's husband, while employed by the defendant and while engaged in the performance of a duty assigned to him, received personal injuries which caused his death. The plaintiff, as his widow, sues for damages under section 4426 of the Revised Statutes, 1889, alleging that the injuries received by her husband were caused by the wrongful act or neglect of the defendant. The defendant is and was at the

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times hereinafter stated a pork packer doing business in the city of St. Louis. On the thirteenth day of May, 1889, he hired the deceased to wash and scrub the tank room, which is connected with his pork-packing estabment. Three days after the deceased went to work, he was scalded in the tank room, from the effects of which he died on the following day. No one saw the accident, and just how it happened and what caused it can only be determined by the circumstances in evidence. The tank room is about twenty-four feet long, and ten or twelve feet wide. In the room are three tanks, used in rendering lard. The material out of which the lard is rendered is put into the tanks from the second story of the building. Steam is applied, and, when the rendering process is completed, the lard is first drawn off, leaving water, dirt and other materials at the bottom of the tanks. The water, which is impregnated with more or less grease, is then drawn off into a box, located on the lower floor beside the tanks. This box is about fifteen feet long, three feet wide and about two feet deep. In order to remove the refuse matter from a tank, it is necessary to remove what is called the "manhole," which is fastened to the tank by means of a bolt and nut. To remove the nut, a large wrench is used. There is also a sliding platform about three feet long and about two feet wide, which is made to fit on top of the hot water box. This platform, according to the weight of the defendant's evidence, was only used by the tank men in cleaning out the tanks, but, according to the plaintiff's evidence and that of one of defendant's witnesses, it was also used to stand on in unscrewing the nut and removing the "manhole."

The plaintiff in her petition charged the defendant with the following acts of negligence: *First.* Allowing the floor and the platform to become wet, slippery

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and greasy. *Second.* Allowing the box of hot water to remain open and exposed without a suitable rail or guard. *Third.* Allowing the platform to remain without rail or guard. *Fourth.* Permitting the tank room to be insufficiently lighted. *Fifth.* Furnishing unsuitable and defective wrenches to remove the nut. *Sixth.* Ordering the deceased, who was a common laborer, to open one of the tanks. The plaintiff also averred in her petition that, within six months after the death of the deceased, she instituted a suit under the statute, and, that on the twenty-third day of January, 1890, she took a nonsuit. The present action was begun on the thirteenth day of May, 1890.

In addition to the general denial, the answer contained the following: "And, for his further answer, defendant states that the death of the said John Reichla was occasioned by his own negligence, and not by any negligence on the part of the defendant." As a further defense it was alleged that, on the twenty-fourth day of February, 1890, the plaintiff, as the next friend of the minor children of the deceased, instituted a suit in the circuit court of the city of St. Louis, and that the plaintiffs averred in their petition that the widow of the deceased had failed to sue for damages within six months after the death of the deceased, and that by reason of such failure a right of action for damages for the death of the father had, under the provisions of the statute, been vested in them. Wherefore, it was alleged by the defendant that the plaintiff was now estopped from alleging that she, as widow, *had* instituted such a suit within six months after the death of her husband, and that she afterwards took a nonsuit in said cause. This portion of the answer was, on motion of the plaintiff, stricken out. The cause was then tried, and the jury under the instructions of

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the court returned a verdict against the defendant for $1,225. The defendant has appealed.

That portion of the defendant's answer, which set forth the alleged estoppel, was properly stricken out. The averments in the petition filed by the minor children, although the plaintiff appeared as next friend, cannot operate as an estoppel against her in this suit, for the reason that the defendant did not act thereon to his prejudice. If he had compromised the suit with the children, or if the suit had been prosecuted to a final judgment against him, then the plaintiff would have been clearly estopped. *Newcomb v. Jones*, 37 Mo. App. 475; *Wilburn v. Railroad*, 48 Mo. App. 224. Therefore, the facts stated in that portion of the answer could under no view be material, because, if in point of fact the plaintiff *did* institute a suit within six months after the death of her husband, under the authority of *McNamara v. Slavens*, 76 Mo. 329, the right of the children to sue was forever gone. If she did not so sue, then she must fail in the present action, regardless of what was done or said by her in the suit of the children.

At the close of the plaintiff's evidence, and also at the close of all the evidence, the defendant asked the court to declare that, under the law and the evidence, there could be no recovery. The instruction was refused, and this action of the court is assigned for error.

The plaintiff's evidence tended to prove that the deceased was hired by the defendant to clean up in the tank room; that, on the third day after his employment, the man whose business it was to attend to the tanks being sick, the defendant ordered the deceased to take off the "manhole" of one of the tanks, which was outside of the line of duty of the deceased; that, upon receiving the order, the deceased went into the tank-

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room, and, within ten or fifteen minutes, he rushed out and called upon some of his fellow-workmen to take off his clothes; that his clothing was stripped off and he was found to be badly scalded on the head, face, neck, hands, arms, and some parts of the upper portion of the body; that he was removed to the hospital and died on the next day. The plaintiff also introduced evidence tending to prove that the tank room had but one opening, and that it afforded but little light; that it was so dark in the room at the time the deceased was injured, that work about the tanks and hot water box could not be done with safety; that there was a gas jet in the room, but that it was not lighted; that the floor in front of the box and the platform was wet and greasy; that the hot water box and platform were not guarded; that the wrenches which were used to unscrew the nut, so as to open the "manhole," were insufficient; that a monkey wrench which was sometimes used for that purpose was too small; that the larger wrench had been so worn by use that it was too large for the nut; that both wrenches had been used by the defendant for some time; that the defendant had admitted that the deceased had used a wrench which was insufficient; that, to do the work which the deceased was ordered to do, required skill, or at least some knowledge of the mode and manner of doing it, which the deceased did not possess. The plaintiff also introduced the files and record to show that, within six months after the death, she instituted her suit, and that she submitted to a nonsuit therein in January, 1890

The plaintiff's evidence touching the alleged failures of duty by the defendant was sufficient to take the case to the jury under proper instructions, unless the whole evidence leaves the cause of the accident a matter of mere conjecture or surmise, and not of legal inference. If the proof is sufficient to make the inference

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admissible, that the deceased lost his life in attempting to carry out the orders of the defendant, and that the accident resulted from any one of the alleged acts of negligence, then the demurrer to the evidence was properly overruled. It must be presumed, there being no evidence to the contrary, that the deceased was exercising due care at the time he received the injuries. *Buesching v. Gas Co.*, 73 Mo. 219. As no one saw the accident, the cause contributing to it must be determined, if at all, by the circumstances and physical facts established by the evidence. Now it must be conceded, for it is the only reasonable inference, that the deceased fell into the hot water box. There was no other place in the tank room, where he could possibly have received his injuries. Under the plaintiff's evidence the fair inference is that the accident occurred while the deceased was attempting to carry out the orders of the master. This made a case for the jury, if it was reasonable to suppose from the evidence that the deceased would not have lost his life, but for some one of the alleged negligent acts of the defendant. The deceased might have fallen into the box by reason of an insufficient light in the tank room; or he might have slipped or fallen on account of the grease which had been allowed to accumulate on the floor in front of the box, or he might have slipped off the platform into the box while attempting to open the tank; or the accident might have been brought about by the wrench slipping off the nut, or by slipping over it onto the bolt, as the evidence showed it possible to do, thereby causing the deceased to lose his balance and fall into the box. The character of the injuries tend to prove that he fell head first, as his lower extremities were not even wet, showing that he must have gotten into the box in one of the ways suggested, as the evidence fails to show that there was anything over which he might

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have stumbled. The further inference may be fairly drawn that, whatever may have produced the accident, if the box had been sufficiently guarded, the deceased would in all reasonable probability have escaped injury. Therefore, the legal inference is admissible, that the deceased was injured by reason of some one of the alleged acts of negligence, and we conclude that the court did right in overruling the demurrer to the evidence.

The defendant complains of the instructions. It will only be necessary to notice those given. The court charged the jury as follows: "In this action the plaintiff seeks to recover damages for the death of her husband, which she alleges was caused by the negligence of the defendant.

"The alleged acts of the defendant, which the plaintiff alleges were acts of negligence, are:

"*First.* Allowing the platform mentioned in evidence to be wet, slippery and greasy.

"*Second.* Allowing the box of hot water mentioned in the evidence to remain open and exposed without a suitable rail or guard.

"*Third.* Allowing the platform to remain without rail or guard.

"*Fourth.* Permitting the place, where the tanks and hot water box were, to be insufficiently lighted to enable one to observe the condition of the premises and appliances, and to safely do the work, which the plaintiff alleges that her husband was ordered to do.

"*Fifth.* Furnishing unsuitable and defective wrenches to do the work mentioned, of which plaintiff alleges there were two, a monkey wrench which was out of repair, rusty, too small, and could not be turned or used on the tank, and another wrench that was defective, worn out, too large for the nut which it was used to turn, and unfit for that use.

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"*Sixth.* Ordering plaintiff's husband, who was a common laborer, to work around the hot water box in question, in the insufficiently lighted place, and to open the tank.

"It is for you to decide from the evidence in this case whether or not the defendant did, or permitted, the acts and conditions above specified, or either of them, and, if so, whether or not such was negligence.

"The law does not require an employer of men to furnish them tools, and implements and conditions, that are absolutely safe, but it does require of him to exercise that degree of care that a man of ordinary common sense and prudence engaged in like business would exercise, to see that the tools and appliances and conditions furnished by him are reasonably safe and suited for the business; and, in the assignment of tasks and duties to his employes, he should exercise a like degree of care and prudence to see that inexperienced men are not assigned to duties for which they are unfitted, and which involve unreasonable risks.

"If, in respect of the above-enumerated alleged acts of the defendant, he did exercise the degree of care above mentioned, he was not guilty of negligence; if he failed to exercise that degree of care, then he was guilty of negligence within the meaning of that term as used in these instructions.

"And, on the other hand, the employe who enters into a service, takes upon himself the risk of hazard, if any, that naturally belongs to that kind of service, and he is required, in the performance of his duties, to exercise that degree of care and prudence to avoid injury to himself, which a man of ordinary common sense and prudence engaged in that kind of business would exercise; and a failure on his part to exercise that degree of care and prudence in that connection is what is meant by the term negligence, as used in these

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instructions in reference to the acts of the plaintiff's deceased husband.

"Unless you believe from the evidence that the defendant did or permitted the above-mentioned acts or conditions alleged as negligence, or either of them, you must find for the defendant.

"And if you believe from the evidence that he did, or permitted said enumerated acts or conditions, or either of them, it will then be your duty to decide under the evidence whether or not such act or condition was negligence on his part, within the meaning of that term as above defined; and, if you find that the same was not negligence within that definition, then your verdict should be for the defendant.

"But, if you find from the evidence that the defendant was guilty of negligence in respect of said alleged acts or conditions, or either of them, then it will be your duty to decide under the evidence whether or not that negligence caused the death of the plaintiff's husband, and, unless you find from the evidence that that negligence did cause said death, your verdict must be for the defendant; and, if you find from the evidence that the defendant was guilty of negligence in respect of said alleged acts or conditions, or either of them, and that that negligence contributed to cause said death, it will be your duty to decide under the evidence whether or not the plaintiff's husband was himself guilty of negligence in the premises, which also contributed to cause his death, and, if you decide that question in the affirmative, your verdict must be for the defendant.

"But, if you believe from the evidence that the defendant was guilty of negligence, within the definition above given, in respect of said alleged acts or conditions, or either of them, and that that negligence caused the death of the plaintiff's husband, and that he was, at

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the time, doing or attempting to do what he was ordered by the defendant to do, and was exercising that degree of care and prudence that a man of ordinary common sense and prudence, in like situation, would have exercised, then your verdict must be for the plaintiff."

At the instance of the plaintiff the court also instructed the jury: "1. If the jury believe that any witness has wilfully testified falsely to any material fact in this case, then you may disregard the whole, or any part, of the testimony of said witness."

"2. If the jury find for the plaintiff, you may, in your verdict, give her such damages, not exceeding $5,000, as you may deem fair and just, under the evidence in the case, with reference to the necessary injury resulting to the plaintiff from the death of her husband.".

On the part of the defendant the jury were further instructed: "The jurors are also instructed that, if they should believe and find from the evidence that the deceased received the injuries complained of by reason of defects in any one of the wrenches mentioned in evidence, while using the same for the purpose of opening the manhole of the rendering tank, also mentioned in evidence, still plaintiff is not entitled to recover, if they further believe and find that the defendant, immediately prior to the accident to the deceased, directed deceased not to attempt to open the said manhole in defendant's absence.

"2. The jurors are also instructed that, if they should believe and find from the evidence that the defendant offered to pay something to the plaintiff in settlement of the previous case brought by her against him, and heretofore tried in circuit court room 2, that fact does not constitute evidence of an admission, upon defendant's part, of any liability for the damages

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sought to be recovered in this action, and they should disregard it."

The court's charge to the jury cannot be sustained. In order to a proper understanding of the subject, it will be necessary to refer to some elementary principles which govern master and servant in their relations as such. It is the law, recognized everywhere, that the master must furnish suitable and reasonably safe instrumentalities with which to accomplish the work assigned to the servant. This not only requires suitable tools and appliances, and competent fellow-servants, but also that the place where the work is to be carried on must be reasonably safe. This latter duty is not only enjoined by the law governing master and servant, but it is also imposed upon the master, as the owner of the premises, by the general law for the protection of all persons lawfully there. *Dayharsh v. Railroad*, 103 Mo. 570; *Hannibal & St. J. Ry. Co. v. Fox*, 31 Kan. 586; *Siela v. Railroad*, 82 Mo. 430; *Covey v. Railroad*, 86 Mo. 635; *Hickman v. Railroad*, 22 Mo. App. 345; *Sullivan v. Mfg. Co.*, 113 Mass. 396; *Coombs v. Cordage Co.*, 102 Mass. 572; *Dowling v. Allen*, 74 Mo. 13; *Gibson v. Railroad*, 46 Mo. 163. On the other hand, the servant by his contract of employment assumes all of the usual and ordinary hazards of the business. *Renfro v. Railroad*, 86 Mo. 302; Wood's Law of Master & Servant, sec. 382. In an action by the servant against the master for personal injuries, received while about the latter's business, it devolves upon the servant to prove that the master failed in some legal duty which he owed to him. If he complains of defects in the instrumentalities of the business, he must show, either that the defects complained of were not obvious, and were unknown to him, but that the master had knowledge thereof, or might have had by ordinary inspection (*Keegan v. Kavanaugh*, 62 Mo. 230); or, if

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the defects were obvious, that the danger was not fully appreciated by him for want of time for consideration (*Cummings v. Collins*, 61 Mo. 520; *McDermott v. Railroad*, 87 Mo. 287); or that the increased danger was not so imminent and threatening as to require him to abandon the service. *Conroy v. Iron Works*, 62 Mo. 35; *Stoddard v. Railroad*, 65 Mo. 514; *Thorpe v. Railroad*, 89 Mo. 650; *Devlin v. Railroad*, 87 Mo. 545; *Huhn v. Railroad*, 92 Mo. 440; *Stephens v. Railroad*, 96 Mo. 207; *Soeder v. Railroad*, 100 Mo. 673; *Fugler v. Bothe*, 43 Mo. App. 44.

Now in the case at bar the defects complained of, with the exception, perhaps, of the alleged defective condition of the wrench, were obvious, and it is quite plain that the court in its charge failed to place the right of recovery under proper legal restrictions and qualifications. The conduct of the deceased in accepting and continuing in the service with knowledge of the alleged defects, strictly speaking, does not present a question of contributory negligence on his part, which, to be available to the defendant, must have been pleaded; but the effect of such conduct, without a further showing by the plaintiff, was to free the defendant from any negligence of which plaintiff had a right to complain. *Flynn v. Bridge Co.*, 42 Mo. App. 529. Therefore, it was a part of the plaintiff's case to show to the satisfaction of the jury either that the deceased, for want of time for consideration, did not fully appreciate the risk attending the execution of defendant's order, or that the increased danger by reason of defective agencies did not threaten immediate injury.

In view of a new trial, there is another matter which we ought to notice. It is insisted by defendant that it was not negligence on his part to use the hot water box and platform without a guard. At the time of the accident we had no statute requiring any kind of dan-

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gerous machinery to be fenced (Session Acts, 1891, sec. 3, p. 160), but the obligation, which the general law imposes upon the owner of premises to guard persons lawfully there against pitfalls, may be applied between master and servant, and a failure to comply with this legal duty might, under the circumstances in a given case, authorize a legal inference of negligence on the part of the master. This view we think is fully sustained by the authorities. *Indermaur v. Dames*, L. R. 1 C. P. 274; *Paterson v. Wallace*, 1 Paterson, 389; *Watling v. Oastler*, L. R. 6 Exch. 74; *Sullivan v. Mfg. Co.*, 113 Mass. 396; *Coombs v. Cordage Co.*, 102 Mass. 572; *Dowling v. Allen*, 74 Mo. 13; *Ryan v. Fowler*, 24 N. Y. 410; Wood's Law of Master & Servant, sec. 334; *Noyer v. Smith*, 28 Vt. 59. But it is further insisted that the defendant was only compelled to keep his place in like condition as other places of business of the same character, and that, as the evidence tended to show, "there being no evidence to the contrary," that the owners of like establishments do not fence the hot water boxes used by them, no negligence could be imputed to defendant for failing to do so. The same argument was advanced in the English court of common pleas, in the case of *Indermaur v. Dames*, *supra*. In answer to the argument, Willes, J., who delivered the opinion of the court, said: "It is ably insisted for defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems to be conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think this argument is inapplicable to the facts of this case: *First*, because it

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was not shown, and probably could not be, that there was any usage never to fence shafts; *secondly*, because it was proved that, when the shaft was not in use, a fence might be resorted to without inconvenience; *and no usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.*"

The position here taken is not in conflict with our decision in the case of *Fugler v. Bothe, supra.* In that case the liability of the defendant was not made to rest on the faulty construction of the appliance, but upon the fact that the appliance furnished for doing the work was unusual and extra hazardous.

In view of a retrial, we have deemed it proper to call attention to the fact that the case of *Fugler v. Bothe, supra*, has been certified to the supreme court, and will in all probability be determined before a retrial of the present action can be had. Whatever may be the decision of the supreme court in that case, it will be the duty of the circuit court to retry the present case in conformity thereto. *Hamilton v. Ins. Co.*, 35 Mo. App. 263.

For the error in the instruction the judgment of the circuit court will be reversed, and the cause remanded. Judge THOMPSON concurs in the opinion as written; Judge ROMBAUER in the result.

HENRY F. ROLL, Respondent, v. THE ST. LOUIS & COLORADO SMELTING & MINING COMPANY, Appellant.

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St. Louis Court of Appeals, December 20, 1892.

1. **Foreign Law:** PRESUMPTIONS. A foreign law must be proved like any other fact, and, in the absence of such proof, it will be assumed that the common law prevails in the foreign jurisdiction.

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2. **Corporations:** VALIDITY OF INCORPORATION. At common law no registry of the charter of a corporation is requisite.

3. ———: ———: ESTOPPEL. A corporation was formed under the laws of a foreign state, under which the registry of the certificate of incorporation was essential. It entered into a contract as a corporation prior to such registry, but completed its organization by such registry prior to the institution of a suit upon the contract. *Held*, in the course of discussion, that it was estopped in that suit from denying the validity of its incorporation.

4. ———: ENFORCEMENT OF CONTRACT FOR ISSUE OF CORPORATE SHARES FOR LESS THAN FULL VALUE. When a corporation contracts to issue corporate shares for a consideration, the fact, that this consideration does not amount to the full value of the shares, is of no consequence in an action by the shareholder against the corporation for the enforcement of the contract.

5. **Practice, Appellate:** COSTS, In a suit in equity the question of the costs of an appeal is to some extent within the discretion of the court. In this cause, wherein the respondent was successful on the main issue, they were taxed against the appellant and respondent in equal shares.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED *(with modification of decree)*.

Bashaw & Isbell, for appellant.

(1) Under the law of Illinois the defendant company had no corporate existence, and was not authorized to proceed to the transaction of any business, until its certificate of incorporation was recorded in the office of the recorder of deeds of St. Clair county, its principal office being located in that county. Act approved April 18, 1872, sec. 4. (2) The failure to record the certificate is not a mere irregularity; it is a vital defect, and there was no authority to do business until the certificate was recorded. What was undertaken was, therefore, of no effect, and the corporation is not bound by it. *Hunt v. Salisbury*, 55 Mo. 310; *Smith v. Warden*, 86 Mo. 382;

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Martin v. Tewell, 79 Mo. 401. (3) There are no facts shown in evidence that a court of equity would say should estop the company from setting up the invalidity of the issue of the certificates of stock claimed by plaintiff. (4) There is no equity in plaintiff's claim. He paid nothing for the stock either to Thomas or the company. Nor did Thomas pay anything therefor to the company. It would, therefore, be unjust to other shareholders to compel an issue of the stock.

Fred. Wislizenus, for respondent.

(1) The evidence shows that Thomas properly acquired the stock from defendant, and that plaintiff properly acquired title from Thomas. (2) There is no evidence of laches in the record. (3) A foreign law must be proved like any other fact. *Conrad v. Fisher*, 37 Mo. App. 352; *Hartman v. Railroad*, 39 Mo. App. 58; *Benne v. Schnecko*, 100 Mo. 580. (4) A corporation is estopped from setting up irregularity in its creation as a defense to claims, arising out of transactions in which the defendant corporation assumed to have full corporate powers. *Reinhard v. Mining Co.*, 107 Mo. 616; *Finch v. Ullmann*, 105 Mo. 263; *Mining Co. v. Richards*, 95 Mo. 112; Morawetz on Private Corporations, sec. 753; *McCarthy v. Lavasche*, 89 Ill. 275.

Rombauer, P. J.—This is a suit in equity having for its object to compel the defendant corporation either to issue to the plaintiff new certificates for twenty thousand shares of its capital stock in lieu of certificates for the same amount issued originally to one J. M. Thomas, and assigned by Thomas to the plaintiff, or, in case that should be found impracticable, to pay him the value thereof, which the petition states to be

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$20,000. The petition does not state in terms that plaintiff ever paid any value for such certificates, or that the corporation ever received any value therefor, but does state that plaintiff is the lawful holder thereof; that he tendered them for surrender to the corporation; that he demanded a reissue in his own name, and that, upon such reissue being refused, he brings this suit. The answer admits that the defendant is now incorporated under the laws of the state of Illinois, and that the certificates of stock mentioned in plaintiff's petition were issued to Thomas before the defendant had any corporate existence; and it states in addition that the defendant never received from the plaintiff or any other person any money or its equivalent for said certificates, and that the plaintiff acquired said certificates with full knowledge of the foregoing facts. Upon the hearing the court made a decree, ordering the defendant either to deliver to the plaintiff within twenty days a *valid* certificate or certificates for twenty thousand shares of its capital stock, or, in case of failure so to do, to have judgment entered against it for the sum of $2,500. The sum thus named the court found to be the actual value of said twenty thousand shares.

The defendant assigns for error that, under the laws of the state of Illinois, the company had no legal existence when the certificates held by plaintiff were issued; that the company after full organization refused to ratify the issue of these shares; that the plaintiff has an adequate remedy at law against Thomas; and that there is no equity in plaintiff's claim, as neither he nor Thomas ever paid to the corporation any value for them.

We find the facts shown by the evidence to be as follows: J. M. Thomas, who appears to have been the original projector of this corporation, caused certain

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parties to apply for incorporation under the laws of the state of Illinois as a mining and smelting corporation, with a capital stock of $3,000,000, divided into three hundred thousand shares of $10 each, of which he originally subscribed for two hundred and ninety-nine thousand, nine hundred and ninety-three shares and several other parties, of whom plaintiff was one, for one share each. The secretary of the state of Illinois, on July 31, 1889, issued a certificate stating that the company was legally organized under the laws of that state. The main office of the company was stated in the corporation certificate to be East St. Louis, in St. Clair county, Illinois. The certificate was not recorded in said county until August 30, 1889. On July 30, 1889, the proposed incorporators met and agreed to buy certain mining property located near Parrot City in the state of Colorado, value not shown anywhere, for $2,999,930, with an understanding subsequently carried out, that Thomas should retain in payment ninety-nine thousand, nine hundred and thirty of the shares of the company and re-transfer to the company two hundred thousand of them.

After the receipt of the secretary's certificate, but prior to its record in St. Clair county, Illinois, the company organized. One Bensieck was elected president and the plaintiff secretary of the company. The certificates in controversy were made out by the plaintiff in the name of Thomas, and signed by the president and himself. He went with them to Thomas, and demanded a transfer of them to himself in payment of certain services which he claimed he had rendered to Thomas in the organization of the company. The tender of these shares, according to the uncontradicted testimony of Thomas, was accompanied with the threat that, unless Thomas would assign these certificates to him, the plaintiff would not deliver to Thomas the bal-

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ance of the shares to which Thomas was entitled, but would burst up the company.

On September 15, 1889, the board of directors met, and adopted the following resolution offered by Thomas who was one of the directors:

"Whereas, by an oversight of the secretary of this company, the certificate of the company organization of the corporation, duly authenticated under the hand of the secretary of state of the state of Illinois, and sealed with the seal of said state, dated the thirty-first day of July, 1889, was not filed in the office of the recorder of deeds of St. Clair county, state of Illinois, being the county where the principal office of this company is located, until the thirtieth day of August, 1889; and,

"Whereas, before said date last mentioned, this company, upon the assumption that it was fully organized and authorized to do business, did, in the name of the corporation, transact certain business; and,

"Whereas, the question as to whether or not said business was legal and binding upon the corporation is only a technical one, such as can be overcome by ratification on the part of the company;

"Now, therefore, be it resolved that the following contracts and acts, entered into in the name and on behalf of the company prior to August 30, 1889, be and the same are hereby ratified and adopted by the company, viz.:

"*First.* The contract with J. M. Thomas to build a smelting plant at Durango, Colorado, approved August 12, 1889, with the amendments and modifications of the same.

"*Also*, the approval of the bond of said Thomas, which said amendments and bond were submitted and approved September 9, 1889.

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"And be it further resolved that all the certificates of stock issued by this company previous to August 30, 1889, be and the same are hereby declared void, and the secretary is hereby directed to call in and cancel all the certificates of stock heretofore issued, and again issue the stock anew to the subscribers the same as if it never had been issued.

"And be it further resolved, that all other acts and things done in the name of the corporation and on its behalf as shown by its minute book and record, or signed by the secretary and president, previous to the thirtieth day of August, 1889, except that heretofore stated, be and the same are now hereby fully approved, ratified and adopted as acts of the corporation."

The plaintiff was present when this resolution was adopted, but voted against it. Some time afterwards he presented the certificate of stock which he held to the officers of the company, demanding the issue of new certificates to him, which were refused. New stock certificates for two hundred and ninety-nine thousand, nine hundred and ninety-four shares were issued to Thomas under the above resolution, and certificates for one share each to six other parties. Thomas subsequently placed two hundred thousand of these shares into the treasury of the company, and from their sale a fund was realized, by the means of which a smelter was erected in Colorado. It appeared in evidence that the stock had no market value at the date of its issue, nor at the date when the suit was instituted, but that the entire property of the company might probably bring $30,000, if put up for sale.

It is evident from the above that there is no merit in the defendant's assignment of error that the company had no legal existence when the certificates held by the plaintiff were issued. The laws of the state of Illinois were not in evidence. A foreign law must be

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proved like any other fact, and, in the absence of such proof, it will be assumed that the question is governed there by the principles of the common law. *Warren v. Lusk*, 16 Mo. 102; *Meyer v. McCabe*, 73 Mo. 236; *Benne v. Schnecko*, 100 Mo. 250. By the common law no registry of the charter of a corporation is required. But, even if we assume that plaintiff's evidence contains an admission that such a record was essential to a full organization of the company, the pleadings and evidence admit that the corporation was fully organized prior to the institution of this suit, and the corporation would be estopped as to any person with whom it contracted as a corporation from setting up its inchoate organization at the date of the contract. The authority of the cases of *Hurt v. Salisbury*, 55 Mo. 310, and *Richardson v. Pitts*, 71 Mo. 128, is questioned in the later decisions of *Granby Mining Co. v. Richards*, 95 Mo. 112; *Ragan v. McElroy*, 98 Mo. 350, and *Reinhard v. Mining Co.*, 107 Mo. 616, which by analogy lead to the above conclusion.

Nor is it an answer to plaintiff's claim that he has an adequate remedy at law against Thomas, since the fact that a complainant has a legal remedy against one person does in no way disprove the fact that he may have a legal or equitable remedy against another. The only question entitled to serious consideration is whether there is any equity in plaintiff's claim under the evidence, and whether the decree in its details is warranted by the facts found. It does not appear that Thomas himself ever gave to the corporation any money, or its equivalent, for the ninety-nine thousand, nine hundred and ninety-three shares which he retained of the original issue made to him, and of which the certificates for twenty thousand shares assigned to plaintiff form a part. On the other hand it does not appear that the corporation ever questioned or now questions

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the title of Thomas to these shares. The controversy is not between creditors of the corporation and the plaintiff, but between the corporation and one of its stockholders, so that the question whether these shares were issued for *full* value is entitled to no consideration. That they were issued for *some* value is apparent from the fact that the company got some property in return, and has failed to show that such property was of no value. This leads us to conclude that the last assignment of error must likewise be overruled.

The only remaining question is whether the evidence warrants the decree in its details. The decree provides that the company shall issue to the plaintiff a *valid* certificate or certificates of stock for twenty thousand shares. This part of the decree goes beyond the prayer of the bill, which prays only for the issue of new certificates in lieu of those tendered for surrender. The insertion of the word *valid* may imply that the court, by its decree, determined that plaintiff, and not Thomas, is ultimately entitled to these shares, which fact was not before the court. The decree also finds the value of these shares to be $2,500, whereas the greatest value shown by the evidence is $2,000, putting the entire value of the company's property at $30,000. The decree will, therefore, be so modified as to require the defendant, within twenty days from the date of the modified judgment entry, to issue to the plaintiff a new certificate in the usual form for twenty thousand shares of the capital stock of the company in lieu of the certificates surrendered, or in case of its failure so to do that judgment be entered against it for the sum of $2,000.

It has been the practice of this court, where the appellant was successful in part, to award the costs of the appeal against the respondent. As this is a case in equity where the question of cost is to some extent

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within the discretion of the court, and as the respondent is successful on the main question, we think we best exercise our discretion by ordering that the costs of the appeal be borne in equal shares by the appellant and respondent. It is so ordered. Judge THOMPSON concurs. Judge BIGGS, while concurring in the finding that the plaintiff, under the facts shown, is entitled to relief, dissents from the order awarding the specific relief.

JOHN MESSICK, Appellant, v. WILLIAM FAIRBURN, Respondent. 52 69

59 59

St. Louis Court of Appeals, December 20, 1892.

Practice, Appellate: DUTY OF APPELLANT IN REGARD TO TRANSCRIPT. In all cases, in which a bill of exceptions is filed, the appellant should notify the clerk whether he desires a perfect transcript of all the proceedings, or merely a transcript of the record entry of the judgment and appeal; and he is in default if he fails to do so.

Appeal from the Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

MOTION TO AFFIRM JUDGMENT OVERRULED.

R. H. Landrum, W. Cloud and *Adiel Sherwood,* for appellant.

Henry Brumback, W. B. Skinner and *Norman Gibbs,* for respondent.

ROMBAUER, P. J.—The trial court rendered a judgment for the defendant on September 3, 1891, and the plaintiff, on the same day, took an appeal to this court. The time for filing a bill of exceptions was extended from time to time by stipulation between the parties

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until September 1, 1892. On August 15, 1892, a bill of exceptions was filed in the case. No transcript was filed in this court prior to December 6, 1892, at which date the respondent filed this motion to affirm the judgment of the trial court. The appellant thereupon produced the transcript and asked leave to file it. Affidavits in support and against the motion are likewise filed.

The appellant claims that he is not in default, because, as soon as notified by the circuit clerk that the transcript of the record was completed, he caused the same to be filed in the clerk's office of this court, and that his doing so is made by statute good cause for refusal to affirm the judgment. Revised Statutes, 1889, sec. 2252. The respondent claims that the appellant is in default, because, as shown by the clerk's affidavit, he did not order the clerk to make out a transcript after the bill of exceptions was filed, which was the main cause of the delay. We conclude that the respondent's position is correct.

Section 2257 of the Revised Statutes of 1889 provides:

"When an appeal shall have been granted to any appellate court, * * * the clerk of the court in which the judgment or degree appealed from was rendered shall, without delay, make out and send to the clerk of such appellate court a complete copy of the record entry of judgment, or decree appealed from, and order granting the appeal, *or in lieu thereof, if the appellant or plaintiff in error shall direct,* a perfect transcript of the record or proceedings in the cause."

A fair construction of this section requires that the appellant, in all cases where a bill of exceptions is filed, should inform the clerk of the circuit court at once whether he desires a perfect transcript of all the proceedings, or merely a transcript of the record entry of

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the judgment and appeal, as he has the option to take either, and he is in default if he fails so to notify the clerk. Any practice to the contrary, which may have grown up in different counties on that subject, is entitled to no consideration since the change introduced by the amendment of 1889.

In view of the fact, however, that this is a case of first impression on this branch of the practice act, we think it would be visiting the appellant with a penalty too severe, if we affirmed the judgment against him for this default. Hence, we will overrule the motion to affirm the judgment, on condltion that the appellant pay the costs of the appeal in any event, and that the cause be set down for hearing on the January call of the present term. So ordered. All the judges concur.

THE STATE OF MISSOURI, Respondent, v. G. S. MARTIN, Appellant.

St. Louis Court of Appeals, December 20, 1892.

Practice, Appellate: FAILURE OF APPELLANT TO PAY FILING FEE. When the defendant in a criminal cause appeals, but fails to pay the clerk of this court the filing fee, and in consequence the cause is not docketed, the state may procure an affirmance of the judgment on the production of a certificate under the statute.

Appeal from the Oregon Circuit Court.—HON. J. F. HALE, Judge.

AFFIRMED.

ROMBAUER, P. J.—A judgment against defendant was rendered in this cause by the trial court February 26, 1891. On the next day succeeding, the defendant took an appeal, and caused a transcript of the record

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to be prepared and sent to the clerk of this court, but he has at no time since paid the filing fee of $10, so as to entitle the cause to be docketed. The state now produces a certificate under the statute, and moves that the judgment be affirmed.

We think this motion must be sustained. Whatever the rule may be in civil cases, it is evident that in criminal cases a failure on part of the appellant to take all necessary steps to have the cause docketed is a failure to prosecute his appeal; any other view would postpone the hearing of these causes on appeal indefinitely, since the state has no funds wherewith to pay a docket fee, which the appellant should have paid, and the prosecuting attorney cannot be expected to advance the amount on his own risk. Judgment affirmed. All the judges concur.

CLARA REICHENBACH, Respondent, v. CHRISTOPHER P. ELLERBE, Superintendent of THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, Representing THE UNITED MASONIC BENEFIT ASSOCIATION OF MISSOURI, Appellant.

St. Louis Court of Appeals, December 20, 1892.

Appeals: JURISDICTION. The superintendent of the insurance department of this state is a state officer, and the supreme court has jurisdiction of an appeal in a case wherein he is a party.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

TRANSFERRED TO THE SUPREME COURT.

ROMBAUER, P. J.—The appellant insurance company has since the appeal was taken herein been dissolved. The superintendent of insurance has upon

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motion been substituted a party defendant herein, and has filed his motion to transfer the cause to the supreme court, as this court has no jurisdiction against him, he being a state officer within the purview of section 12 of article 6 of the constitution. The motion is well taken, and must be sustained.

Ordered that the cause be transferred to the supreme court. All concur.

H. A. BROCKHAUS, Appellant, v. ERNEST SCHILLING *et al.*, Respondents; and ERNEST SCHILLING, Respondent, v. H. A. BROCKHAUS *et al.*, Appellants. 52 73 / 76 91

St. Louis Court of Appeals, December 20, 1892.

1. **Sales:** RESCISSION FOR MISREPRESENTATION: MATTER OF OPINION. In the course of negotiations for the sale of a bar-room and stock of liquors, the seller stated that the liquors would last a certain time. *Held*, that this was merely an expression of opinion and belief, and that, even if it was false, it was not such a false representation as in law entitled a party to the rescission of a contract.

2. ———: ———: DUTY OF DEFRAUDED PARTY. A party, who is induced to enter into a contract through material misrepresentation, cannot maintain an action in equity for the rescission of the contract, where, owing to his failure to act promptly on learning of the misrepresentation, there has been such a change of circumstances that he cannot place the other contracting party *in statu quo*.

3. ———: MATERIAL MISREPRESENTATION BY VENDOR: RECOUPMENT BY VENDEE. Where, in such case, the vendor sues the vendee for the purchase price, the latter may under proper pleadings reduce the recovery by the amount of his damages in consequence of the misrepresentation; but he cannot entirely defeat a recovery, when there is not a complete failure of consideration.

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Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED.

Edmond A. B. Garesche, for appellants.

(1) Where there is a breach of warranty, the vendee may return the property and rescind the contract within a reasonable time, or he may retain it, and, when sued for the purchase money, plead a total or partial failure of consideration. *Branson v. Turner*, 77 Mo. 489. A failure of consideration may be shown for the purpose of defeating an action for the price, even when there has been no notice to the vendor, and no return, or offer to return the property. *Kerr v. Haymaker*, 20 Mo. App. 350. (2) The representations made by respondent Schilling to appellant Brockhaus, in regard to the average receipts and expenditures of the business, were false, and entitled Brockhaus to rescind the sale. Newmark on Sales, sec. 355; 2 Story on Contracts, sec. 1081. Being false, even though not fraudulently made, they authorize a rescission, or disaffirmance. 1 Wharton on Contracts, sec. 214. They were the assertion of facts peculiarly within the vendor's knowledge, and amounted to a warranty. Newmark on Sales, sec. 357; 2 Benjamin on Sales [Am. Notes by Kerr] sec. 817, p. 905; *Carter v. Black*, 46 Mo. 384; 1 Wharton on Contracts, sec. 219. Even his assertion that the appellant would have wines, liquors and cigars enough to last him until the first of January was a fraud, and would entitle appellant to disaffirm the sale. *Hanger v. Evans*, 38 Ark. 334. False statements in regard to the receipts of a public house warrant a rescission. *Dobell v. Stephens*, 3 B. & C; *Pelmore v. Hood*, 5 Bing.

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N. R. 97; *Bowring v. Stephens*, 2 Car. & P. 337; *Pierson v. Wheeler*, Ryan & Moody, 303. The question of reasonable time in which a rescission should take place is generally one of fact. *Johnson v. Agricultural Co.*, 20 Mo. App. 100. (3) Even though it be granted that the trial court was right in holding that appellant was not entitled to affirmative equitable relief, yet this would not deprive him of his right to urge a total or partial failure of consideration in the suit upon the note. This question the trial court entirely overlooked. And in this connection I submit that the finding of the trial court against appellant in the suit upon the note, being against the law under the undisputed evidence, warrants the interference of this court. *Avery v. Fitzgerald*, 94 Mo. 207. This judgment can only be attributed to an oversight or mistake, and should be set aside by this court. *Mauerman v. Railroad*, 41 Mo. App. 348.

E. T. Farish, for respondent.

THOMPSON, J.—The first of these actions is in the nature of a suit in equity to rescind a contract, whereby the plaintiff purchased from the defendant a saloon, fixtures and contents, in the city of St. Louis. This action was brought on the thirteenth of October, 1891. The right of rescission claimed in the petition is predicated upon fraudulent representations, alleged to have been made by the defendant to the plaintiff, whereby the plaintiff was induced to become the purchaser of the saloon. The second of these actions is an action at law on a promissory note for $1,650, made by the defendant, H. A. Brockhaus, on the twentieth of August, 1891, and payable thirty days after date, and indorsed by Ignatz Stock. This note was given in part payment of the purchase money of the saloon

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already spoken of. The action on this note was commenced on October 14, 1891, the day following the commencement of the equitable action for the rescission of the contract. The defendant in the action at law set up as a defense to the note the same facts which he had set up as plaintiff in his petition in equity for the rescission of the contract, and concluded with the averment that, by reason of the facts thus stated, the note was wholly without consideration. The two causes were, by consent of parties, consolidated for the purposes of the trial, and the issues of fact involved in them were submitted to the court, the parties waiving a jury. In the action at law the defendant, in order to raise the questions of law on which he predicated his defense against the note, tendered the two following declarations of law, which the court refused to give: "The court declares the law to be that, even though it, sitting as a jury, may believe from the evidence that the defendant made inquiries of other parties concerning the property sold to him by plaintiff, before he paid the full amount of the purchase money and received a bill of sale for it, yet, if the court, sitting as a jury, believes that the plaintiff knowingly made false representations with regard to material facts bearing upon the question of the value of the property sold to defendant, which were relied upon by defendant, and which were one of the inducing causes of the purchase, then its finding must be for defendant."

"The court sitting as a jury declares the law to be that, if plaintiff falsely and fraudulently represented to defendant 'that the saloon sold to defendant was bringing in $35 to $40 a day, and that the expenses of running it were only $22 a day, and that, if defendant purchased it, he would have sufficient wines, liquors and cigars to last him until the first day of January, 1892,' and knew that said representations were not true;

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and if the court believes that these representations were made to induce plaintiff to buy, and relying thereon he did buy, or if the court sitting as a jury believes that plaintiff made such representations as of his own knowledge, not knowing them to be true, and defendant purchased the saloon relying thereon, then plaintiff is not entitled to recover."

The court, after hearing the evidence, took the consolidated cause under advisement, and finally rendered judgment for the defendant in the suit in equity, and judgment for the plaintiff in the suit at law on the note. To reverse this judgment Brockhaus, the plaintiff in the suit in equity and the principal defendant in the suit at law, prosecutes the present appeal.

Although these two causes were consolidated, becoming in effect one suit, it seems necessary, in disposing of the questions which arose on the appeal, to treat them as separate causes, in so far as is necessary to get the suit in equity out of the way. The facts substantially were that Brockhaus, the plaintiff in the suit in equity, although he had had no experience in the saloon business, desired to become the purchaser of the saloon and to go into that business. To that end he began negotiations with Schilling, the defendant in the suit in equity, who had a saloon on North Third street in the city of St. Louis, which he was running through the aid of Henry Haskenhoff under an arrangement by which the profits were divided between him and Haskenhoff. Schilling first demanded the sum of $3,000 for the saloon, but, after considerable negotiations, the trade was closed at the purchase price of $2,825. The day on which the bargain was struck was August 17, 1891. On that day Brockhaus paid Schilling $100 as earnest money. On the following morning Brockhaus took possession of the saloon and gave Schilling his check for $1,000 more by way of a cash

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payment. He afterwards made a still further cash payment of $75, and finally, on the twentieth of August, gave the note for $1,650, which is the subject of the action at law, and which represents the remainder of the purchase money. This note had thirty days to run. Brockhaus was thus in possession of the saloon from the eighteenth of August, two days prior to the consummation of the trade. The false representations, by reason of which Brockhaus claims a rescission of the contract, consisted of a statement made to him by Schilling that the average receipts of the saloon were from $35 to $40 a day, and also that the stock of liquors and cigars on hand would last until the first of January, 1892. The first of these representations proved to be an exaggeration. The receipts at that time were frequently between $35 and $40 a day, but this was during the summer season when more beer is consumed than in colder weather. For instance, on the eighteenth of August, the first day that Brockhaus took possession, the receipts seem to have been about $38, and on the following day they were between $37 and $39. But books had been kept of the cash receipts of the saloon; and the average receipts, as shown by these books, extending back for a year and a half, amounted to but little over $28 a day.

As to the second statement, that the stock on hand would last until the first of January following, this must be laid out of view as being a mere matter of opinion and belief, and not such a fraudulent representation as in law entitles a party to a rescission of a contract. Exceptional cases might exist, where such a statement might afford ground of rescission; but we are dealing only with the case presented by this record, and this record shows that, before consummating the trade, Brockhaus took to his aid a Mr. Williams, who was an experienced saloon keeper, and that Williams

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made a careful inspection of all the stock on hand. From this it is impossible to conclude that Brockhaus could have relied upon this representation of Schilling, even if it were such a representation as would otherwise entitle him to a rescission.

The question, whether the representation that the average receipts amounted to from $35 to $40 a day, which we find from the evidence to have been the representation made, was such a misrepresentation of the existing facts as entitled Brockhaus to a rescission, if other difficulties in the way of a rescission were out of the way, seems to be a close question. There is no ground for the conclusion upon this record that any obstruction was laid in the way of the ascertainment by Brockhaus of the exact fact. Although informed that books had been kept, he did not, prior to the purchase, request the privilege of seeing them; and it appears that he was offered by Haskenhoff the privilege of seeing the day book containing the daily receipts for three months preceding, but declined or neglected it. He never, prior to making the contract, took the pains to inquire of Haskenhoff what the average daily receipts were. He was on the ground, and had every means of ascertaining the exact truth if he had seen fit to do so; and, hence, his failure to do so must be ascribed to negligence. But this failure to do so makes it doubtful whether he regarded the question of the past average daily receipts as an important matter, although the evidence shows that it is an important element of the value of such a property, and whether he thereafter acted in reliance upon this statement of Schilling or not. A memorandum of opinion, filed by the circuit judge, indicates his opinion to have been that Brockhaus did not rely upon this statement of Schilling. But, for the purpose of throwing into clear light the ground on which we feel bound to decide the equitable

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branch of the case, we shall assume that this statement of Schilling as to the average daily receipts was such a material misrepresentation of an existing fact, as entitled Brockhaus to a rescission, if he had proceeded promptly after discovering the misrepresentation, and had offered to put Schilling *in statu quo*. Now, the evidence shows that, after Brockhaus entered into possession of the saloon, he kept Haskenhoff in his employ during the remainder of the month of August. Haskenhoff testified at the trial as Brockhaus' own witness. Although, as already stated, Brockhaus did not, before he closed the bargain, take the pains to ask Haskenhoff what the average daily receipts were, yet he did make such inquiry of Haskenhoff after he had bought the place and entered into possession; and Haskenhoff told him that the receipts were about $30, $32 and $35 a day, sometimes more and sometimes less. This, it may reasonably be inferred, was immediately or shortly after he had bought the saloon. When asked when this was, Haskenhoff said: "When he had the place bought already; he never asked me before." Haskenhoff also testified that, before the trade was closed, he told Brockhaus that they had been keeping books, but Brockhaus never asked to see the books.

We take it to be well-settled law that, laying out of view the question of the négligence of Brockhaus in not asking to see the books or not inquiring of Haskenhoff, before the trade was consummated, what the average receipts were, yet he is precluded from maintaining a suit in equity for a rescission, by reason of not disaffirming promptly, and demanding a rescission of Schilling as soon as Haskenhoff conveyed to him this information about the average daily receipts. Instead of doing that, he went on until the note given for the unpaid balance of purchase money had matured,

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and then for the first time he demanded a rescission, but not in any formal way.

His testimony on this point is: "*Q*. Now did you make any offer to return this saloon to Schilling? *A*. Yes, sir; I told him he could take the place back.

"*Q*. When did you do that—before you instituted this suit? *A*. Yes, whenever the note was due, at that time,—or before already."

On cross-examination Brockhaus stated that this was before the note fell due. "Schilling came in and asked me if I found everything the way he told me, and I told him no; I would rather he take his place back. That was about the first part of September. I do not remember the date."

The peculiar nature of the property, which was the subject of the sale, was such as required a prompt disaffirmance on the part of Brockhaus, as soon as he discovered that material misrepresentations had been made to him. He was in daily possession and use of the property, and was enjoying the good will of the business and the profits accruing from it. He had already sold a part of the stock which was included in the sale to him. In fact, he could not, after the lapse of such a time, place Schilling *in statu quo*. We have lately gone over the law on the subject of the right to rescind a contract of sale on the ground that the property delivered is not as represented, with the conclusion that no right of rescission exists in such a case where there has been such a change of circumstances, through lapse of time or otherwise, as disables the purchaser from putting the seller *in statu quo*. *Tower v. Pauly*, 51 Mo. App. 75, and cases cited. This we understand to be the general rule of law, not only with regard to the right to disaffirm contracts of sale and sue to recover back the purchase money at law, but also with regard to the right to rescind in equity.

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There can be no involuntary rescission, no rescission against the will of the other party to the trade, unless he can be put *in statu quo;* but the party, who otherwise might have the right of rescission, is remitted to his action at law for damages for the deceit. It was upon this ground that the circuit court held that Brockhaus was not entitled to equitable relief under the petition in which he is plaintiff, and we are of opinion that the circuit court rightly held this, and consequently we affirm so much of the judgment as dismisses the suit in equity.

It does not necessarily follow from the foregoing views that Brockhaus was not entitled by way of counterclaim or recoupment to an abatement of Schilling's recovery on the note, to the extent to which he sustained loss through Schilling's fraudulent misrepresentation, if such it is to be regarded. It was a well-settled principle of the common law that a party, who has been induced by the deceitful representations of another to enter into a contract to his injury, may maintain an action to recover the damages which he has suffered by reason of the deceit. *Gerhard v. Bates*, 2 El. & Bl. 476. Under our code of civil procedure a defendant, who is sued upon a written obligation to pay money, may undoubtedly plead by way of *counterclaim* (Revised Statutes, sec. 2050), or to establish a *failure of consideration* in whole or in part (Revised Statutes, sec. 2090), any matter arising out of the contract or transaction, which resulted in the giving of the obligation sued on, and which would furnish an independent ground of action *ex delicto* against the plaintiff for damages for deceit. Under such an answer and in a case like the present, the measure of damages, in respect of which the defendant would be entitled to a recoupment by way of a counterclaim, or to an abatement of the plaintiff's recovery by reason of a failure of consid-

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eration, would be the difference between the value of the property, if the representations of the plaintiff which induced him to purchase it had been true, and the value as it actually turned out to be. A good deal of evidence was given, apparently upon this theory; but the difficulty which we find in dealing with the defense to the action at law consists in the fact, that no instruction or declaration of the law was requested on this theory, and that it was not the theory of the answer. The two instructions which were requested, and which we have already set out, proceed on the ground that the fraudulent representations, if the court should find such to have been made, constituted a complete defense to the action upon the note. Such we do not understand to be the law. Our understanding is that such representations merely entitled Brockhaus to a recoupment, or to an abatement of the recovery on the note, on the theory of a failure of consideration to the extent to which Brockhaus had been *damaged* by reason of the fraudulent representations. If the whole sale had taken place on credit, and the action had been brought for the entire agreed purchase price, instead of being brought for the balance of it represented by this note, the theory of these instructions would result in a total defeat of the action, irrespective of the amount which Brockhaus had lost by reason of the deceit; and, since for reasons already stated there can be no rescission, this would leave him in the possession of the property, while, at the same time, being exonerated from paying for it. The theory of the answer of Brockhaus to the petition on the note, and the theory of these instructions, precludes us from putting the trial court in the wrong in the disposition which it made of the second branch of the case, consisting of the action on the note.

The judgment of the circuit court is accordingly affirmed. All the judges concur.

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ELIZABETH DROEGE, Respondent, v. FRANCIS W. DROEGE, Appellant.

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St. Louis Court of Appeals, December 20, 1892.

1. **Husband and Wife:** ACTION FOR MAINTENANCE. A wife is not entitled to relief in an action by her against her husband for mainten ance, when she has left him without his consent and under circumstances which do not amount to an abandonment by him.

2. ———: CONSTRUCTIVE ABANDONMENT BY HUSBAND. *Held, arguendo,* that the wife is bound to follow the fortunes of her husband, and to live where he chooses, and in the style and manner which he may adopt; also, that, to justify an abandonment of the husband by the wife, his conduct towards her must have been such as would entitle her to a divorce.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

REVERSED AND REMANDED *(with directions)*.

Smith P. Galt, for appellant.

Broadhead & Hezel, for respondent.

Revised Statutes, section 6856, provides that the husband is liable to an action for maintenance in a case where, without good cause, he refuses or neglects to maintain or provide for his wife. A failure to properly provide for the wife, when the husband is able, constitutes "good cause." Where a wife lives apart from her husband with his consent, he is still bound to support her; and, if it be not shown that she has refused to return to him upon his request, she is entitled to a decree for maintenance. *Lindenschmidt v. Lindenschmidt*, 29 Mo. App. 295; *Dwyer v. Dwyer*, 26 Mo. App. 653.

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THOMPSON, J.—This is a petition by a married woman against her husband, under section 6856 of the Revised Statutes, for maintenance for herself and two children of the marriage. The court made a decree requiring him to pay to the plaintiff the sum of $215 before a day named, and the sum of $40 on the first of each month thereafter until further order of the court, and that, in default of the payment of any of the said sums, execution issue therefor, and also for the costs. From this order defendant prosecutes an appeal to this court.

The petition states that the plaintiff is the lawful wife of the defendant, and was married to him at the city of St. Louis in the year 1875; that there were two children born of the marriage, one a boy, William, fifteen years old, and the other a girl, Mary, thirteen years old; that at all times since the marriage the plaintiff has demeaned herself and performed all the duties as defendant's wife; but that the defendant, regardless of his duties as the husband of plaintiff and as the father of said children, and without cause, did, on the ——— day of May, 1884, abandon his said wife and children, and has since then refused and neglected to maintain and provide for her or for the children, and refused to speak to or recognize them or any of them. The answer admits the marriage and the births of the children, as stated in the petition, and denies each and every allegation therein contained; and then avers that the plaintiff did, on or about the ——— day of May, 1884, desert and abandon the defendant, taking with her the children, and that she has ever since refused and neglected to live with him or to permit him the society of the children.

The evidence shows that, for a nnmber of years after their marriage, the spouses lived together as husband and wife with the mother of the plaintiff, Mrs. Mehan,

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first at St. Louis, next at a farm purchased by Mrs. Mehan in Washington county, and again at the residence of Mrs. Mehan in St. Louis; that, in the year 1884, the defendant requested the plaintiff to set up a separate housekeeping establishment instead of living with the mother-in-law, to which the plaintiff refused to consent. The parties were catholics, and the defendant thereupon complained to the priest of her refusal to leave her mother and live in a separate house, and the priest went to her and advised her to follow him, which she reluctantly did. For some time prior to this separation from the mother-in-law, the defendant had been employed in the Simmons Hardware Company, first at $60 a month and afterwards at $1,000 a year, or $83.33 a month, and a bonus of $100 at the end of each six months, making his total compensation at the rate of $100 a month in case of remaining with the company continuously for either half of a year. His current payments were made semi-monthly. When he received the first semi-monthly payment of $30, he gave $20 of it to his wife, and, when she discovered that he had given her no more, she complained angrily, and he, thereupon, gave her $5 more, and continued to give her $25 while his salary thus remained at $60 a month. When the increase in his salary took place, he gave her $30 every two weeks. During each of these periods he expended the remainder in clothing himself, paying his incidental expenses, and discharging debts previously contracted for his clothing and the like. This is his testimony. The testimony of the plaintiff tends to show that he gave her money in small sums, amounting, as she estimated it, to about $25 a month. She claims that he did not adequately support the family either in respect of food or clothing. He, on the other hand, claims that out of the sum which he gave his wife the family were suitably provided for, and in this he is supported

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by the testimony of Mrs. Freund, who occupied a portion of the house into which he and his family moved when they left the mother-in-law. Mrs. Freund testifies that the children were dressed better than her children, and that Mrs. Droege was dressed better than she dressed.

No serious charge of misconduct in his marital relations is attempted against the defendant, except that he was in the habit of staying out in the evening; and this charge comes from the testimony of the mother-in-law rather than from that of the wife. The wife testifies that she could not piece out a support for herself and children on the sums of money which he was giving her, but that her mother helped her out by giving her $2 or $3 a week. She testified that she complained to him of the inadequate support that he was giving his family, and told him that she intended to leave him and go back to her mother, and that he told her to do as she pleased. He, on the other hand, claims that he never knew anything about the purpose on her part to leave him, until he discovered that she had done so. The circumstances under which she left him are not in dispute. He went, according to his custom, to his daily employment at the Simmons Hardware Company, at seven o'clock in the morning of July 14, 1884. At that time he and his wife had been keeping house separately from the mother-in-law for about four months. On returning home at night he found that their rooms were stripped of everything, and that his wife and children were gone. The evidence shows that, when he left in the morning to go to his work, either the wife or the mother-in-law procured a wagon, and the wife assisted by the mother-in-law loaded everything there was in the house, including the defendant's clothing, and, having locked the door and delivered the key to Mrs. Freund, abandoned the

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premises, and hauled the furniture away and deposited it in a vacant house which the mother-in-law had recently built. They seem to have done this on the expectation that the defendant would follow them. This he did not do,—not even for the purpose of recovering his clothing which they had carried off. He never held any further communication with them, nor they with him, with the exceptions which will be presently stated. He never solicited her to return nor did she ever offer to return. He never endeavored to retain possession of his children, and, consequently, she never had an opportunity to assent to or resist such an endeavor. He never contributed anything to their support, with the exception of paying the bills for medical services and medicines on an occasion when the little girl was sick. On this occasion, the little girl being quite sick, his wife wrote to him, informing him of the fact and telling him that if he desired to see her he could call. He did so, and remained in the sick room about half an hour. The testimony of both the spouses shows that their greeting and conversation were of the most cold and formal kind. On other occasions he saw his little boy, but either refused or neglected to speak to him. On one occasion the little boy went down to the store of the Simmons Hardware Company, where his father was employed, and the father, being busy, paid no attention to him, did not even speak to him, but turned and went away to his office. He is still employed by the Simmons Hardware Company at the aggregate salary of $1,200 a year, payable as already stated, and seems to be well regarded by his employers. During the seven years of separation between the spouses, which intervened between this desertion by the plaintiff and the bringing of this suit, she lived with her mother in the city of St. Louis, with the exception of one year when they resided in

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California. During three years of this time, Mrs. Mehan kept a grocery, but she and the plaintiff are at present supporting themselves and the two children of this marriage by keeping a boarding house.

The statute, under which the action is brought, and under which alone any right to the relief sought can be predicated, reads as follows: "Sec. 6856. When the husband, without good cause, shall abandon his wife, and refuse or neglect to maintain and provide for her, the circuit court, on her petition for that purpose, shall order and adjudge such support and maintenance to be provided and paid by the husband for the wife and her children, or any of them, by that marriage, out of his property, and for such time as the nature of the case and the circumstances of the parties shall require, and compel the husband to give security for such maintenance, and from time to time make such further orders touching the same as shall be just, and enforce such judgment by execution, sequestration of property, or by such other lawful means as are in accordance with the practice of the court; and, as long as said maintenance is continued, the husband shall not be charged with the wife's debts, contracted after the judgment for such maintenance."

We say that the petition is necessarily predicated upon the statute, because, although a husband is liable at common law for the support of his wife, unless her right to be supported by him has been forfeited by her misconduct, yet the only form in which this liability is worked out is by her procuring necessaries from third parties, who, thereby, acquire a right of action against him for the necessaries so furnished; and the same is the rule with reference to his liability to support his minor children. We are of opinion that the evidence entirely fails to show the case, stated in this statute and alleged in the plaintiff's petition, of a husband, without

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any cause, abandoning his wife, and refusing or neglecting to maintain and provide for her. These things,—the abandonment *and* the refusal or neglect to maintain and provide for her,—are placed by the statute in the conjunctive and not in the disjunctive, and, therefore, both these conditions must concur in order that she may sustain a petition under the statute. The evidence in the present case not only fails to show that he abandoned her, but it shows that she secretly abandoned him, and has never since offered to return to him, unless regard can be had to the offer which she made when testifying as a witness in this case. She testified that she was willing to go and live with him, "if he provides for his wife as he should." Her counsel then asked: "Well, do you mean as he should, or as he can?" She answered: "As he can." "*Q*. You are willing to live with him, if he provides for his family as well as he can with his earnings? *A*. Yes, sir." Whether this action would entitle her to the relief which she seeks, if made to him prior to the commencement of this suit, or even in her petition, we need not consider, because, on the well-settled rule of procedure in this state, her right to relief must stand or fall upon the condition of things existing at the time of bringing her suit. We do not wish to intimate that a husband, who has been abandoned by his wife, taking the children of the marriage with her, for a period of eight years, without just cause, is bound to condone her offense after the expiration of so long a time, upon finding that she needs his support for herself and the children.

There does not seem to be much occasion for a further discussion of the evidence. We concede that, if the husband, by his misconduct, had driven the wife from the family residence, that would not have been an abandonment on her part within the meaning of the

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statute, but would have been an abandonment on his part. But there is no evidence which could justify such a conclusion. In fact, no serious attempt is made to exhibit misconduct on his part, except in the testimony of the mother-in-law, other than the failure adequately to support his wife and children.. Mere non-support does not constitute such indignities as will justify the wife in abandoning her husband, though it may be conceded that non-support, when coupled with other circumstances, may. The wife is bound to follow the fortunes of her husband, and to live where he chooses to live and in the style and manner which he may adopt. *Messenger v. Messenger*, 56 Mo. 329; *Kaster v. Kaster*, 43 Mo. App. 115. The text-writers and judicial authorities, so far as we are acquainted with them, show that, in order to justify an abandonment of the husband by the wife, his conduct towards her must have been such as would constitute the foundation of an action on her part for a divorce. *Pierce v. Pierce*, 33 Iowa, 238; Bishop on Marriage, Divorce & Separation, sec. 1742. The only ground on which the plaintiff in this action justifies her abandonment of the defendant is non-support; and that ground is not only not made out by the evidence, but is negatived to some extent by her own testimony. This will appear from the following colloquium extracted from her cross-examination: "*Q*. Well, had you told him why you were going to leave him? *A*. Well, I told him I could not live that way.

"*Q*. The only reason you gave is that he did not furnish you with support in the style in which you thought you ought to live? *A*. Well, there was no style at all.

"*Q*. Well, style is a mere matter of comparison. *A*. There was no question of style at all; I only wanted support.

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"*Q*. That was the reason why you were going to leave him, because he did not support you? *A*. Yes, sir; because he didn't support me.

"*Q*. You did leave? *A*. Yes, sir.

"*Q*. Your rent was paid? *A*. Yes, he paid the rent.

"*Q*. You had enough to eat? *A*. Well, yes, I had enough to eat.

"*Q*. About enough? *A*. Of course I wasn't starving.

"*Q*. And you had a place to sleep? *A*. Yes.

"*Q*. And wherewith to be clothed? *A*. Yes.

"*Q*. And so had the children? *A*. Well, our clothing didn't cost him very much.

"*Q*. Of course he didn't expect you to be extravagant? *A*. My mother saw that I wouldn't want for anything.

"*Q*. And he had the same accommodations that you had? *A*. Yes, he came home when he felt like it."

While it is a rule in cases of conflicting evidence where the facts are, as in this case, tried by the court as in equity, that the appellate court will defer to the conclusions of the trial court, yet the evidence so clearly falls short of showing any justification on the part of the wife for deserting her husband as she did, and, hence, so clearly falls short of making out a case, under the allegations of her petition and the provisions of the statute, that we feel constrained to reverse the judgment, and remand the cause with directions to enter judgment in favor of the defendant dismissing the suit. Counsel for the plaintiff rest their right to an affirmance of the judgment upon the doctrine of this court announced *obiter* in the case of *Dwyer v. Dwyer*, 26 Mo. App. 653, which was a divorce case, and afterwards reaffirmed and applied in *Lindenschmidt*

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v. Lindenschmidt, 29 Mo. App. 295, which was like this a suit under the statute by a wife for maintenance. That doctrine is that, while a wife remains away from her husband's domicile with his consent, he is bound to support her. But that doctrine must be restrained to cases where the separation takes place by mutual consent, and is continued by mutual consent, which was the case of *Lindenschmidt v. Lindenschmidt*, or where, though it takes place through the wrong of one or both of the spouses, such wrong not being of the character which affords grounds for divorce, neither of them will consent to resume the marital cohabitation. What we said in the *Dwyer case* was this: "It is clear of all doubt on this record that the defendant [the wife] was induced to leave the home of the plaintiff on account of ill-treatment by him, and that from that day to this he has done nothing in the way of reparation, nothing which indicates on his part a willingness to have her return. On the contrary, it sufficiently appears that he is unwilling to have her return and resume the duties of a wife. She is, therefore, to be taken and deemed as remaining away from his home by his consent and desire, and this consent and this desire are, of themselves, a reasonable cause for her continuing to remain away." *Dwyer v. Dwyer*, 16 Mo. App. 427, 428. In the second case of *Dwyer v. Dwyer*, this court quoted and reaffirmed this language upon the evidence again before it as characterizing the circumstances under which the spouses had separated and continued to remain apart. This court then added, but, of course, speaking with reference to the facts then before it: "It is not doubted by any member of the court that, while a wife remains away from the husband's domicile, with his consent, under such circumstances, he is bound in law, to support her, and she has power to charge him for nec-

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essaries." 26 Mo. App. 653. We did not say that such a state of facts made a case for maintenance under the statute under which the present petition is prosecuted; and what we hold in the present case will not necessarily conclude the question, whether or not Mrs. Droege can charge her husband for necessaries for herself and children under the principles of the common law. As the wife is under coverture, no judgment can be rendered against her for costs. The judgment is reversed and remanded with directions to enter judgment for the defendant dismissing the suit. It is so ordered. All the judges concur.

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Christopher McHoney, Respondent, v. The German Insurance Company of Freeport, Illinois, Appellant.

St. Louis Court of Appeals, December 20, 1892.

1. **Reformation of Fire Insurance Policy:** LACHES OF INSURED. It is the duty of the insured to promptly examine a fire insurance policy, when he receives it, and to see whether it corresponds with the agreement made therefor. He will not be entitled to the reformation of the policy, so as to make it to conform to alleged oral agreements on the part of the soliciting agent of the insurance company, if he retains the policy without objection for an unreasonable time; nor will the inability of the insured to read alter the effect of such retention.

2. **Preponderance of the Evidence.** Such oral agreements were established by the unsupported testimony of the insured alone, and his testimony was contradicted on every material point by that of the soliciting agent of the insurance company, who, moreover, at the date of the trial, was wholly disinterested. *Held*, that the preponderance of the evidence was, therefore, with the insurance company.

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Appeal from the Montgomery Circuit Court.—Hon. E. M. Hughes, Judge.

Reversed.

James D. Barnett, for appellant.

(1) Plaintiff contracted with Laird, whose authority as agent he knew to be limited, for an insurance policy. It was his duty within a reasonable time after the receipt of the policy to examine it, and if erroneous to have it corrected. His failure to complain of the provisions of the contract is an acceptance of them. *Ins. Co. v. Neiberger*, 74 Mo. 168; *Clem v. Ins. Co.*, 29 Mo. App. 666. (2) A court of equity will not alter or reform a written contract unless the evidence of fraud or mistake is clear and unmistakable. If the mistake is made by an agent whose power is known to be limited, it must be shown that the principal is also a party.

Barker & Shackelford and *John M. Barker*, for respondent.

(1) Plaintiff knew nothing of Laird's authority. The case of *Neiberger v. Ins. Co.*, 74 Mo. 167, is not in point, because in that case there was no evidence showing the insured could not read or write, or that he intrusted the agent to fix up the papers as McHoney did. In McHoney's case there is an application which is as much a part of the contract as a policy, and it was changed, and beyond his control. In *Clem v. Ins. Co.*, 29 Mo. App. 666, the court simply says that the insured should return an unsatisfactory policy "after the discovery" of objectionable features. We insist that no court ever has or ever will extend that doctrine so as to deny a remedy to those who have been

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imposed upon. If such were the case, the ignorant and the trusting would be in the complete power of the designing and dishonest. (2) The evidence of the plaintiff was clear and well supported his petition. The evidence was before the chancellor where he could hear and see the witnesses and could best judge of the facts, and his finding is conclusive.

THOMPSON, J.—This case was before this court on a former appeal. 44 Mo. App. 427. It was again tried before the judge sitting as a chancellor, and the court, after hearing the evidence and taking the case under advisement until the next term, rendered a judgment disposing of the whole case in favor of the plaintiff, by adjudging that he recover the amount secured by the policy with interest. In other words, the court proceeded upon the evidence adduced in support of the first count, which was in the nature of a bill in equity to reform the policy, to adjudge that the policy be reformed, and then, proceeding to do complete justice, rendered an ordinary judgment at law on the policy, *quod recuperet*. This was contrary to the mode of procedure pointed out by this court on the former appeal; but, in the view we take of the case, it will not be necessary for us to make it turn upon this question of procedure. It plainly appears that, applying the law to the conceded facts, the plaintiff is not entitled to recover on either count. The grounds on which a reformation of the policy was sought for under the first count were, that a soliciting agent of the defendant had presented himself to the plaintiff and had persuaded the plaintiff to make the usual written application for the policy; that the plaintiff was unable to read and write; that the defendant's soliciting agent thereupon undertook to fill out the application for him; and that this soliciting agent, either through mistake

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or fraud, filled out the application so as to state several material facts differently from the manner in which the plaintiff stated them to him, and from the real truth. One of these facts was that the dwelling-house, which was the subject of the insurance, was occupied by a tenant as a private dwelling, whereas in point of fact it was unoccupied at the time, though subsequently occupied by a tenant as a private dwelling. The plaintiff's evidence was to the effect that the soliciting agent of the defendant, who thus erroneously or falsely filled out this clause of the application, represented to him that the policy would contain a thirty-day clause, applicable to premises which were rented to tenants; that is to say, a clause permitting such premises to be unoccupied for a period not to exceed thirty days pending a change of tenants. In pursuance of the application, as made and delivered to the agent of the company at Montgomery City, a policy was drawn up and sent to the plaintiff by mail. This policy did not contain any such thirty-day clause as above described, but it did contain this clause of the application indorsed upon the back of it, with this preliminary statement: "The following questions and answers are taken from the application, signed by the assured and referred to in the within policy, and are the assured's warranty and made a part of the contract of insurance. * * * 'It is occupied by tenant as a private dwelling.'" The policy on its face contained this clause: "By the acceptance of this policy the insured covenants that the application shall be and form a part hereof, and a warranty by the assured, and the company shall not be bound by any act or statement made to or by any agent, unless inserted in this contract." Another clause of the policy was as follows: "If said building, or either of them *(sic)*, now is or shall become vacant or

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unoccupied, * * * then and in every case this policy shall be absolutely void.'' The policy bore date the eighth day of January, 1886, and insured the dwelling-house in the sum of $700, for the term of five years, in consideration of a note for $14 given by the plaintiff which it is admitted was paid. It is conceded that the premises were vacant when the application was made, thus reciting that they were occupied by a tenant as a dwelling-house. It is also conceded that, although they had been subsequently occupied, they were in fact vacant at the time when the house was destroyed by fire. This was admitted in two letters written by the attorneys of the plaintiff to the defendant, in which they demanded a settlement of the loss, and is admitted by the plaintiff in his testimony, although he claims that he did not personally know that the tenant had moved out at the date of the fire. This fact, under the terms of the policy, renders it void.

The dwelling-house thus insured was destroyed by fire on the fifteenth of March, 1887, more than fourteen months after the policy had been delivered to the plaintiff. The plaintiff admits in his testimony that during all this time he kept the policy in his possession without examining its terms and conditions. During all this time the plaintiff had the policy in his possession containing these recitals in its body and indorsed on its back. Whatever fraud or deception may have been practiced upon him by the soliciting agent in filling out his answers to the questions in the application, by keeping the policy in his possession without examination, he, in intendment of law, accepted it as written, and assented to its terms as constituting the contract, and the only contract between him and the defendant. This is clearly shown by the decision of the supreme court in *American Ins. Co. v.*

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Neiberger, 74 Mo. 167, where a person, who had taken out a policy of insurance and made a cash payment and given premium notes, was sued on two of the premium notes, and attempted to avoid his liability thereon on the ground that the agent of the company, who procured him to take out the insurance, represented to him that he would obtain for him a policy containing a clause providing for cancellation by the assured, whereas the policy delivered to him contained no such clause and was otherwise different from what the agent represented that it would be. But it appeared that the policy was issued on the twenty-fifth of January, and that it was not rejected until the tenth of the following May. The court held that, by keeping it for this length of time without objection, he assented to its terms, and thereby made it the contract between himself and the insurance company. Mr. Justice Hough, in giving the opinion of the court, said: "If the written application had undertaken to set forth all the provisions which the policy to be issued should contain, of course both parties would be bound by it, and parol evidence would be inadmissible to vary its terms. But, when the application does not attempt to set forth all the provisions which the policy to be issued must contain, and the agent, with or without authority, represents that the policy will contain certain stipulations, which are not unlawful, then the policy must contain them, or the insured will not be bound to accept it. But in such case it will be the duty of the insured when he receives the policy promptly to examine the same, and, if it does not contain the stipulations agreed upon, to at once notify the company of such fact, and of his refusal to accept said policy. The policy in this case was issued on the twenty-fifth day of January, 1875, and it was not rejected by defendant until May 10, 1875. If the policy was received by

the defendant soon after the date on which it purports to have been issued, we think he waited too long to elect whether he would receive the policy without the stipulation in regard to cancellation, or refuse to accept it because it did not contain such stipulation. After such delay, he will be deemed to have accepted the policy as issued." At p. 173.

The case before us is a stronger case for the application of the principle thus laid down by the supreme court than was the case before that court; for here the delay of the assured was more than four times as long as in that case, and, what is more, he never examined his policy until after the loss had taken place. It would be idle for insurance companies to attempt to protect themselves by any clause in policies of insurance, if such clauses could be set aside after such a lapse of time, and after the happening of a loss, upon parol evidence—and not only this, but upon the contradicted parol evidence of the assured party alone. Such a doctrine would, as forcibly argued by the counsel for the insurance company in this case, convert every policy of fire insurance into a promissory note of the insurance company, defeasible in case the insured property should not happen to burn down. Nor does the fact that the plaintiff could not read take his case out of this principle. His wife could read; his daughter could read; his neighbors could read; his lawyers could read; and the same duty rested upon him of informing himself seasonably whether or not the provisions of the contract, as executed and delivered to him, complied with the original understanding, as rests under such circumstances upon contracting parties who are not illiterate.

It thus appears that, upon the contract subsisting between the parties and upon the undisputed evidence, the plaintiff is not entitled to recover in this case; and

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the judgment must accordingly be reversed. It is so ordered with the concurrence of all the judges.

ON MOTION FOR REHEARING.

ROMBAUER, P. J.—The plaintiff, while conceding that the rule stated in *American Ins. Co. v. Neiberger*, 74 Mo. 167, when applied to the facts of this case, is fatal to his recovery, claims a rehearing on the ground that that case has been overruled by later decisions of the supreme court. He cites a number of subsequent cases, all of which we have carefully examined. We fail to discover that the *Neiberger case* has been overruled in any of them, either expressly or by implication. As that decision under the constitution is binding upon us, any argument that that case was not well considered by the supreme court, and that it is in conflict with the law in other jurisdictions, is necessarily precluded.

We wish, however, to state more pointedly what we have intimated in our former opinion—that, even if the *Neiberger case* were out of the way, the plaintiff under the evidence in the record is not entitled to the relief prayed for, and granted by the trial court. His claim of fraud and mistake rests upon his own unsupported evidence, which on every material point is contradicted by the person who wrote the application, and who at the date of the trial was, as the record shows, a wholly disinterested witness. The preponderance of evidence, therefore, on the controlling question involved was with the defendant and not with the plaintiff, and that fact of itself, under elementary rules applicable to equity proceedings of this character, is sufficient to debar him of recovery.

The motion for rehearing is overruled. Judge BIGGS concurs.

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OLIVER CARDER, Appellant, v. JAMES L. PRIMM, Administrator of the Estate of FRANCIS M. CARDER, Respondent.

St. Louis Court of Appeals, December 20, 1892.

1. **Evidence:** LEADING QUESTIONS. It is within the discretion of the trial court to permit leading questions in the examination of a witness.

2. ———: IMPEACHMENT OF WITNESS: LAYING FOUNDATION. When it is sought to impeach a witness by proof of his prior declarat'ens, inconsistent with his testimony, a foundation must be laid therefor by directing the attention of the witness to such prior declarations, so as to afford him an opportunity to say whether he made them, and to explain them, if made.

3. **Presumptions:** BURDEN OF PROOF. When an indebtedness is once shown to exist, it is presumed to continue unless the contrary is shown. Accordingly, when a collection of money by an agent for his principal is established, there is no presumption that he has paid or accounted for it to his principal.

4. **Principal and Agent:** STATUTE OF LIMITATIONS. With respect to a claim by a principal against his agent for money collected by the latter for him, the statute of limitations does not begin to run until the principal has notice of the collection, and possibly not until demand by him.

Appeal from the Knox County Circuit Court.—HON. BEN. E. TURNER, Judge.

REVERSED AND REMANDED.

Blair & Marchand, for appellant.

O. D. Jones and *L. F. Cottey*, for respondent.

THOMPSON, J.—This case was before this court on a former appeal. 47 Mo. App. 301. The court there decided three propositions: *First.* That the testi-

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mony adduced by the plaintiff to prove the indebtedness of the deceased to the plaintiff, consisting as it did of a certain oral statement admitting the indebtedness, made to a witness several months prior to the death of the deceased, was, though possibly the weakest species of evidence, sufficient to entitle the plaintiff to go to the jury. *Second.* That no error was committed in allowing the defendant's counsel to cross-examine the plaintiff's witness as to conversations had between the witness and third persons in which the witness had spoken of a certain lawyer having an undue influence over the probate judge in preventing the allowance of this claim,—this court being of opinion that this evidence was proper for the purpose of showing the animus of the witness in the prosecution of the claim and his feelings and bias respecting it. *Third.* That the defense of the statute of limitations was unavailing, because not raised in any way upon the record.

The case has now been tried again by a jury, resulting in a verdict and judgment for the defendant, and the plaintiff again prosecutes an appeal to this court. Numerous errors are assigned, but we shall only notice those that seem to possess substantial merit.

The evidence given in support of the claims was substantially the same as on the former trial. It consisted of testimony to the effect that the deceased had, about nine months before his death, ridden on horseback to where the witness was shucking corn in his field, and had there had a conversation with him in which he admitted that he had between $700 and $800 of money belonging to the present plaintiff.

The first witness called on behalf of the defendant was Dr. F. M. Wright, who had lived in Knox county for twenty-seven years, and who was acquainted with the deceased Frank Carder in his lifetime, and also

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with his uncle, Oliver Carder, this plaintiff. It was attempted to prove directly by this witness that, in 1872 or 1873, he paid a certain amount of money on two notes, one made to French Carder and the other to Frank Carder, the deceased, and that Frank Carder, the deceased, and French Carder both admitted to him that the money was the property of Oliver Carder, this plaintiff. On objection of the plaintiff's counsel the court ruled out the evidence of these admissions as hearsay. The defendant then attempted to get before the jury evidence of the fact, that the money so paid was the money of Oliver Carder, in the following way: The witness was asked whether he ever had a conversation with the plaintiff about this matter, and he answered that he had. Next came the following colloquium: "*Q*. Did you ever have a conversation with Oliver Carder once, in which he showed you a memoranda *(sic)* on a book against Frank Carder for the sum of $219? (Objected to as leading.)

"By the court: The objection is overruled. (To the said action of the court in overruling the said evidence plaintiff's counsel did then and there object and save exception herein.) *A*. I did.

"*Q*. When and where was that? *A*. It was in Colony, I think.

"*Q*. How long ago? *A*. Over a year ago, and under two years—I don't remember the dates.

"*Q*. Do you remember the purport of the item there, what it was? (Objected to as being illegal and incompetent, and because the book is the best evidence of the fact.)

"*Q*. What did he state in that connection?

"By the court: And what he said?

"By Mr. Jones (counsel for the defendant): Yes, sir; what Oliver Carder said in that connection?

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"By the court: You state what Oliver said, Doctor. *A.* Oliver Carder said that the note that Frank Carder had on me was $219, and something.

"*Q.* Well, now then, was that the money he said he charged Frank Carder with? (Objected to as being leading.)

"*Q.* Did he have the item of $219 charged against Carder on his books?

"By the court: Was that the amount of the note you paid? *A.* That is the original amount of the note I paid.

"*Q.* Was that the French Carder note? *A.* The French Carder note.

"*Q.* Now then, the fact is the sum you paid to Frank Carder on the French Carder note herein referred to was $219, was it not? (Objected to because the question assumed the fact.)

"*Q.* Now then, at what time, Doctor, did you make the last payment on the French Carder note? *A.* The last payment that I made—(Objected to as being incompetent, irrelevant and immaterial.)

"By the court: The objection overruled. (To the said action of the court in overruling the said question the plaintiff's counsel did then and there object and saved exceptions herein.)

"*Q.* How much? *A.* It says here January 23, 1873. (Plaintiff objected to the note and indorsements thereon in connection with it, because the note and indorsements are the best evidence.)

"By the court: From an examination of that note and the indorsements thereon is your memory refreshed? *A.* Yes, sir; when I read the note my memory is refreshed.

"By the court: Is it now refreshed? *A.* Yes, sir.

"By the court: What is the date? *A.* January 23, 1873. He told me the item on his books was for

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the money I paid to F. M. Carder. Plaintiff showed me a book with $219 on it."

Error is assigned upon the admission of the question against plaintiff's objection: "Did you have a conversation with Oliver Carder once, in which he showed you a memoranda *(sic)* book against Frank Carder for the sum of $219?" As the only objection to the question was on the ground that it was leading, and, as it is within the discretion of the trial court to permit leading questions, this assignment of error presents nothing for review. If the plaintiff desired to have parol evidence of the contents of the supposed "memoranda book" excluded on the ground that the book itself was the best evidence, he should have made his objection on that ground, and then the question would have arisen whether the objection was tenable or not.

The next assignment of error will be best understood if we state that when Dr. Wright, the first witness called for the defendant, was on the stand, undergoing his direct examination, counsel for the defendant asked him whether he had a conversation with Mr. Hume, who, it will be recalled, was the only witness for the plaintiff, with reference to this case, to which Dr. Wright answered that he had had such a conversation with him at Colony perhaps two or three years before. The following question was then asked: "*Q*. Did he say to you in substance that he wanted you to talk to Judge Fowler, the probate judge of this county, about this case, and to try to counteract on the mind of Judge Fowler any influence Mr. Cottey as an attorney in the case might have on his mind—any undue influence? (Counsel for the plaintiff objected to this question 'as being incompetent, irrelevant and immaterial, there being no foundation laid for it.') By the court: The objection overruled. You laid the foundation; you propounded the question to the witness and he admitted

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it as being true. (To which plaintiff at the time excepted.)"

Here the matter was dropped, and the succeeding interrogatories directed the attention of the witness to the conversation had between him and the plaintiff, spoken of in the preceding paragraph. The overruling of the plaintiff's objection to the following question in the above colloquium is assigned as error: "Did he [the witness Hume] say to you in substance that he wanted you to talk to Judge Fowler, the probate judge of the county, about this case, and to try to counteract on the mind of Judge Fowler any influence Mr. Cottey, as an attorney in the case, might have on his mind—any undue influence?" As the record does not show that the witness answered the question in the affirmative or in any other way, the assignment of error and the argument built upon it seems to be of no force whatever.

The defendant offered in evidence the testimony of William F. Hume, the only witness for the plaintiff, as preserved in the bill of exceptions taken in the last trial of the case. This was objected to as being incompetent, illegal and immaterial, and "because the counsel for the defendant allege none, nor point out any contradictions made by the witness from the evidence preserved in the bill of exceptions which he now offers to read." The bill of exceptions having been identified, the court overruled the objection, and the plaintiff excepted. The testimony of the witness Hume as preserved in the bill of exceptions at the former trial was then read at length, consisting of twenty pages of transcript. This ruling was erroneous on any conceivable theory. The testimony was not admissible as a deposition, because the witness was present, and had given his testimony and had been cross-examined. *Leeser v. Boekhoff*, 38 Mo. App. 454.

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It was not admissible for the purpose of an indirect impeachment on the theory of his having testified at the former trial contrary to his testimony at the present trial, because no foundation had been laid by directing the attention of the witness to his former testimony and allowing him to say whether or not he had made such or such statements in testifying at the former trial, and, if different from his present statements, allowing him the opportunity to explain. "The rule," said Mr. Chief Justice WAITE, "is that the contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it." *The Charles Morgan*, 115 U. S. 69. Citations could be multiplied indefinitely in support of this statement, but it seems unnecessary, because it is a rule that is understood, or should be, by all lawyers and judges.

We now pass to the instructions, and we must deal with those which were not the subject of exceptions as well as those which were, in order to aid the court and counsel, if we can, in another trial of the cause. At the request of the plaintiff the court gave the following instruction; "1. If the jury believe from the evidence that Homer Harr paid Francis M. Carder in December, 1872, for the plaintiff in this suit, then the law presumes that said Francis M. Carder paid said money in a reasonable time thereafter to plaintiff in the absence of any evidence to the contrary."

We do not understand that there is any such presumption of law. There is a general presumption of right acting on the part of public officials which is sometimes extended to private persons, but it is one of

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the weakest presumptions of law, and generally operates merely to shift the burden of proof. We do not understand that it is a presumption that can be dealt out to a jury as evidence on such an issue as was here on trial. The rule of law, as laid down in this case by this court on the former appeal, is to the contrary of this instruction. That rule was that a state of things once shown to exist is presumed to continue until the contrary is made to appear, and that, when indebtedness is shown to exist, it is presumed to continue to be owing until it is made to appear that it has been paid.

The next instruction given on behalf of the plaintiff was a similar instruction, relating to the money which Dr. Wright testified as having paid to the deceased in 1873. We are of opinion that the giving of it should be avoided on another trial for the reason above stated.

The court refused an instruction tendered by the plaintiff with reference to the application of the statute of limitations, and gave an instruction tendered by the defendant. The instruction tendered by the plaintiff and refused was as follows: "Although the jury may believe from the evidence that Francis M. Carder received from Dr. Wright, in A. D. 1873, money for the plaintiff, and that said Francis M. Carder received in December, A. D. 1872, money from Homer Harr for plaintiff, yet the statute of limitations can avail nothing, unless the jury shall believe from the evidence that said Francis M. Carder, or some person for him, informed plaintiff thereof, or that plaintiff had knowledge thereof, five years before this suit was instituted in the probate court of this county; and, if the jury believe that no such notice of such collections was given, and that plaintiff had no knowledge of such collections, then the jury will find for the plaintiff in such sum as the evidence shows said Carder had in his

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possession, if any, with interest thereon from the date of the acknowledgment of said Francis M. Carder in October or November, 1886, at the rate of six per cent. per annum."

The instruction on this subject, tendered by the defendant and given, was as follows: "If you find from the evidence in the cause that F. M. Carder, deceased, was in his lifetime the agent of the plaintiff to collect money for him in this state, and that the money sued for in this suit is the money paid to him by the witnesses, Dr. Wright, Harr and others, then an action accrued to plaintiff on the payment of the money to said Carder, deceased, and the statute of limitations of five years commenced to run in his favor immediately on the payment of said money; and, if the evidence shows that more than five years elapsed between the time of the payment of said money to said Carder and his decease in the year A. D. 1887, then the plaintiff cannot recover, and your verdict should be for the defendant."

It is perceived that the proposition of law embodied in the plaintiff's refused instruction is that the statute of limitations does not commence to run against an action by a principal against his agent for the collection of money, until the principal has been notified or has acquired knowledge that the agent has collected the money; whereas the proposition embodied in the defendant's instruction, which was given, is that the statute commenced to run immediately upon the payment of the money to the agent. In giving this instruction the court seems to have proceeded upon the rule laid down by the Kansas City Court of Appeals in *Aultman v. Adams*, 35 Mo. App. 503, as applicable to the case where the collecting agent is an attorney at law. The court there held that, it being the duty of an attorney making a collection to pay it over at once

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to his client, an action lies therefor on the part of the client immediately upon the receipt of the money by the attorney, except in case of concealment of the fact by the attorney, and that the statute of limitations begins to run at that date. In so holding the court cited a number of decisions in Pennsylvania, but made no reference to a number of decisions of the supreme court and of this court holding the contrary doctrine in regard to collecting agents generally. In *State ex rel. v. Minor*, 44 Mo. 373, it was held that a right of action on the bond of a sheriff for failing to account for moneys collected by him does not accrue, so as to put in motion the statute of limitations, until there has been either a demand of payment by the parties in interest, or until the officer has made a proper return or report to the court, showing that the money has been realized. In *Kirk v. Sportsman*, 48 Mo. 382, this principle was reaffirmed with regard to a constable in an action on the bond of such an officer. This principle was recognized by Judge LEWIS, in *State to use v. Dailey*, 4 Mo. App. 172, 176, which collects many authorities on the subject. The distinction in that case is carefully taken between the case where there is a continuing trust or bailment, and the case where it is the duty of the agent to pay over the money at once on the fact of collection. The reasoning of that case shows that it is rather the receipt of the notice of the collection which puts the statute in motion, than it is the fact of demand, for the learned judge said: "The principal cannot, by omitting to make the necessary demand, suspend the operation of the statute for an indefinite period. Upon receiving notice of the collection, he must make the requisite demand within a reasonable time; and, if he omit to do so, he puts the statute in motion, nevertheless." At p. 176. In another part of the opinion the learned judge said: "The authorities

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are very numerous in which it is held that, in cases of agency simply to collect and pay over, the statute begins to run from demand and refusal." At p. 177. In *McClurg v. Hill*, not reported, but abstracted in 7 Mo. App. 579, this court distinctly held that the statute of limitations begins to run against an attorney, on a claim for money collected for the client, from the time of the latter's knowledge of the collection; and that holding was reaffirmed in *Donahue v. Bragg*, 49 Mo. App. 273. This is in accordance with the rule as laid down in *Beardslee v. Boyd*, 37 Mo. 180, 182, where it was held, using the language of the court, that "to hold an attorney liable for money collected by him as such, there must be a demand and a refusal to pay, or failure to remit according to instructions after a reasonable time." In *Cockrill v. Kirkpatrick*, 9 Mo. 697, a doctrine is announced which would necessarily lead to the conclusion, that the statute of limitations does not begin to run until a demand for payment is made by the principal of his agent; for it is there held that a principal cannot maintain an action against an agent for money collected until demand for the payment of the same is made. So, in *Evans v. King*, 16 Mo. 525, it was held that, where money had been collected from the government by the administrator of a deceased claimant, the person to whom the deceased in his lifetime assigned the claim could not maintain an action against the administrator until demand and refusal of payment. These decisions all tend to the conclusion that, at the very least, in the case of the right of action of a principal against his agent for money collected, the right of action does not accrue, and the statute of limitations does not begin to run, until the principal has notice of the collection, and possibly not until demand made by him, and in no case until demand,

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where the agency is in the nature of a continuing trust, as it is in the case of a banker who collects money and holds it on deposit subject to check by his customer.

Now the evidence in this case entirely fails to show the nature and scope of the agency of Francis M. Carder for his uncle, Oliver Carder, this plaintiff. It does not show that it became his duty, on making the collections, to turn the money over immediately to the plaintiff. It does not negative the conclusion, that he may have been permitted to hold it until demand made by the plaintiff. There is no evidence as to the time when, if at all, the plaintiff became apprised of the fact that the collection had been made, except such as is found in the evidence of Dr. Wright in the colloquium which we have already set out, and that evidence related to an interview between the witness and the plaintiff which took place one or two years before the trial. To say the least then, it was necessary for the defendant, in order to invoke the statute of limitations, to show that the plaintiff had knowledge of the fact of the money having been collected more than five years prior to the death of the deceased. The giving of the defendant's instruction above set out, and the refusal of the plaintiff's, was, therefore, prejudicial error. As there is no evidence that Francis M. Carder, the deceased, was an attorney at law, there does not seem to be such a contradiction between our conclusion with reference to the statute of limitations, and the reasoning of the Kansas City Court of Appeals in *Aultman v. Adams*, 35 Mo. App. 503, as requires us to certify this cause to the supreme court under the constitutional mandate or as would produce a conflict of authority between the two courts.

For the ruling admitting in evidence the testimony of the witness Hume at the former trial, and for these

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rulings in respect of the statute of limitations, the judgment must be reversed and the cause remanded. It is so ordered. All the judges concur.

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52 114 / 50 76 / 52 114 / 71 8 ADOLPH A. JANIS *et al.*, Respondents, v. KATE ROENTGEN AND CUNO J. ROENTGEN; KATE ROENTGEN, Appellant.

St. Louis Court of Appeals, December 27, 1892.

Contract: IMPLIED AGREEMENT OR UNDERSTANDING TO COMPOUND A FELONY. A contract to pay money upon an agreement or understanding for the compounding of a felony is invalid, whether such agreement or understanding is express or implied.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

Henry Boemler, for appellant.

Rassieur & Schnurmacher, for respondents.

BIGGS, J.—There was a judgment in the circuit court against both defendants for the sum of $1,384.50. Kate Roentgen alone has appealed, and claims that the judgment as to her is unsupported by the evidence. Upon this assignment only is a reversal asked.

The action was on a promissory note executed by Kate Roentgen jointly with her son, Cuno J. Roentgen. The separate answer of the mother was to the effect, that her son had been employed by the plaintiffs, who were wholesale dry-goods merchants; that they charged him with embezzling certain goods belonging to them, and that they agreed with her and her son that, if she would execute the note in suit, they

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would not prosecute her son criminally for such embezzlement; that the note was executed in pursuance of this agreement; and that this was the only consideration of the note. In other words the defense is made, that the consideration of the note was an agreement to compound a felony, whereby it is void and not enforceable in an action in a court of justice.

Both defendants, and the wife of Cuno, who was present at the time of the settlement and with whom the plaintiffs first opened negotiations for a settlement, testified positively that $1,500 in cash was paid to the plaintiffs by Kate Roentgen, and that the note was signed by her and Cuno upon the express agreement, that the latter would *not be prosecuted*, and that his crime should be *concealed.* The evidence of both parties was to the effect that, at the time the settlement was made, Cuno admitted or at least did not deny his guilt; that there was no prosecution, and that the crime *had been concealed* until about the time of the institution of this suit, which was about one year after the settlement.

Virginius O. Saunders, one of the plaintiffs, testified that he was present at the time the settlement was made, and that there was no agreement that Cuno would not be prosecuted; that there was nothing said about it. We extract the following from his cross-examination: "*Q.* Mr. Saunders, you say you well knew what the law on that subject was, did you? *A.* Yes, sir; I know what the law is in regard to compounding felony.

"*Q.* You knew that he had taken these goods, did you? *A.* Yes, sir.

"*Q.* You even went up to the Four Courts to get a detective to investigate this matter, did you not? *A.* To get a detective to catch him; yes, sir.

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"*Q*. You knew you could have prosecuted him for that, didn't you? *A*. I suppose I could; yes, sir.

"*Q*. You did not prosecute him for that? *A*. No, sir.

"*Q*. But you took money for it, and you have kept this matter quiet ever since, haven't you? *A*. Well, certainly.

"*Q*. Now I am asking you, and you say you know the law, if you say you did not compromisé a felony, what do you call it? *A*. I don't know what you would call it, I would not call it compounding a felony; I am not the judge in the case, *but I say, if a young man shows a disposition to right a wrong—*" Here the sentence was broken off by interruption of counsel.

Adolph A, Janis, the other plaintiff, also testified that the money was paid, and the note was given without any agreement on his part or that of his partner not to prosecute the defendant Cuno for the embezzlement. On his examination in chief, the following question was asked the witness: "*Q*. After the $1,500 was paid, and before the note was signed, what conversation did you and your partner and Roentgen and his mother have, if any? *A*. *I congratulated Cuno and Mrs. Roentgen on paying this money, and on settling the matter that was necessarily very disagreeable to us all.*"

On cross-examination he was asked the following questions: "*Q*. Didn't you tell me why Mrs. Roentgen signed that note? *A*. I did not. I said I supposed the reason she signed it was because he was her son, and she wanted to help him.

"*Q*. And to keep him out of the penitentiary? *A*. I never said a word about the penitentiary; never used any such language.

"*Q*. Why, then, did you congratulate Cuno after the money was paid and the note was signed? *A*.

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Because it was a settlement of an ugly affair for him, and he had a chance of leading a new life and making a man of himself."

When the entire evidence is considered, we are at a loss to know how the trial court arrived at the conclusion that there was not at least an *implied* agreement or understanding that, if the defendants would execute the note, Cuno would not be prosecuted, and that his crime would be concealed. The finding can only be accounted for upon the theory that the court was of the opinion that there must have been an *express* agreement or understanding to that effect, which we do not understand to be the law in this state. In the case of *Sumner v. Summers*, 54 Mo. 345, the circuit court instructed the jury that, if "the obligation sued on was executed by the defendants upon an agreement or understanding, either express or *implied*," etc., that the prosecution against one of the defendants would be abandoned, etc., then the obligation was void, etc. In approval of this instruction, the supreme court said in its opinion: "It is the agreement, either express or *implied*, to abstain from prosecution, or to dismiss a prosecution already begun, which taints the whole transaction and avoids the contract." In the more recent case of *McCoy v. Green*, 83 Mo. 626, the supreme court expressly reaffirmed the principle. So, in the case of *Baker v. Farris*, 61 Mo. 389, it was decided that "a note given for the purpose of *defeating the execution of the criminal law, or for compounding a felony*, is against public policy and void." Our statute on the subject of compounding felonies (Revised Statutes, 1889, sec. 3681) provides: "Every person having a knowledge of the actual commission of any offense punishable by death, or by imprisonment in the penitentiary, who shall take any money or property of another or any gratuity or reward, or any *promise*,

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undertaking or engagement therefor upon agreement or undertaking, express or *implied*, to compound or *conceal* such crime, or to abstain from any prosecution therefor, or withhold any evidence thereof, shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding five years."

That the defendants' own evidence established at least that there was an *implied* agreement or understanding that, if the note was given, Cuno would not be prosecuted, and that his crime would be concealed by plaintiffs, does not seem to us to admit of serious controversy or doubt. They admit that they knew at the time the note was given that Cuno was guilty of embezzling goods belonging to them of the value of about $3,000; that they knew that he was subject to a prosecution for felony; that they did not prosecute him, but *concealed* his crime until this suit was begun; and Mr. Janis admits that, after the money had been paid and the note executed, he congratulated Cuno "*because it was a settlement of an ugly affair for him, and he had a chance of leading a new life, and making a man of himself;*" and if Mr. Saunders had not been interrupted by counsel it is quite evident that he would have thrown more light, if any more were needed, on the real character of the transaction. The congratulations extended by Mr. Janis to Cuno can only be accounted for upon the ground that, in making the settlement, the latter had not only purchased immunity from prosecution of his crime, but that his offense against the law and society should thereby be concealed. When to this is added the fact that Mrs. Roentgen would not in reason have paid $1,500 in money, and involved herself in debt, without some assurance that her son would not be prosecuted, and when the further fact is considered that Mrs. Roentgen, Cuno and his wife, all swear that there *was* an agreement not to

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prosecute, and that the offense should be concealed, we are forced to the conclusion, that, as the finding is so strongly opposed to all the reasonable probabilities it must, when the law governing such a defense is considered, have been the result of a mistake. *Mauerman v. Railroad*, 41 Mo. App. 348. It was said in the leading English case on this subject (*Collins v. Blantern*, 2 Wilson, 341, 349): "The manner of the transaction was to gild over and conceal the truth, and whenever courts of law see such attempts made to conceal such wicked deeds they will brush away the cobweb varnish, and show the transactions in their true light."

The judgment of the circuit court will be reversed, and the cause remanded.

FRED BURGER, Respondent, v. THE ST. LOUIS, KEOKUK & NORTHWESTERN RAILWAY COMPANY, Appellant.

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St. Louis Court of Appeals, December 27, 1892.

1. **Railroads:** ATTRACTIVE DANGERS ON RIGHT OF WAY. It is negligence for a railway company to permit salt to remain exposed on its tracks, or on its right of way near them, so as to attract cattle, after it has become chargeable with notice that salt is thus exposed; and this, though it did not place the salt there, it being held guilty of negligence in such cases on the theory that its duty is to so police its right of way, as to prevent and remove all attractive dangers placed on its tracks or right of way by its servants or others.

2. ———: ———. And, where salt has thus been left exposed under a warehouse on the right of way of a railway company and near its tracks, it was *held*, that the railway company could not avoid liability in consequence thereof by mere proof that the warehouse belonged to a third party.

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3. ——: ——: EFFECT OF KNOWLEDGE OF DANGER BY OWNER OF STOCK. An owner of stock may allow it to run at large notwithstanding that he knows that salt has been left thus exposed, and such knowledge will, therefore, not affect his right to recover for the loss of the stock in consequence of the negligence of the railway company.

4. ——: ——: SUFFICIENCY OF EVIDENCE OF RESULTING DAMAGES. To authorize a recovery for the loss of cattle alleged to have resulted from such negligence, it is incumbent upon the plaintiff to show by substantial evidence that the negligence was the cause of the injury sued for, though such evidence may be circumstantial. And *held*, ROMBAUER, P. J., *dissenting*, that the evidence thereof in this cause was sufficient.

5. ——: KILLING OF STOCK: DAMAGES. The damages of the owner of stock for the negligent killing thereof cannot be reduced by proof of the value of parts of the carcass, it not being the duty of the owner to make use of the carcass.

6. **Practice, Appellate:** RECITAL IN TRANSCRIPT OF OFFICIAL CHARACTER OF A JUSTICE OF THE PEACE. The official character of a justice of the peace, before whom an action for the killing of stock has been instituted, is established *prima facie* by a recital thereof in the transcript on appeal.

Per Rombauer, P. J., dissenting:—

7. **Railroads:** ATTRACTIVE DANGERS ON RIGHT OF WAY. While a railway company is under an obligation to police its track, so as not to make it extra hazardous to cattle at large, it is not under a similar duty with respect to its right of way outside of its tracks.

Appeal from the Lincoln Circuit Court.—HON. E. M. HUGHES, Judge.

REVERSED AND REMANDED (*nisi, and certified to Supreme Court*).

Palmer Trimble and *Dunn & Murphy*, for appellant.

Joseph W. Powell, for respondent.

BIGGS, J.—The plaintiff recovered a judgment against the defendant for $145, the value of five head of cattle, alleged to have been killed through the

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negligence of the defendant. Two of the animals were killed during the night of May 23, and three in the night of May 25, 1891. The negligence, which caused the accident, is stated as follows: "The said defendant by its agents and servants did negligently and carelessly allow salt to be left uninclosed under and about its depot and warehouse building at the station of Hurricane, in the township of Burr Oak, and, by reason of such negligence and carelessness, the said cattle were attracted upon said railroad track of the said defendant and were killed as aforesaid." At the close of the plaintiff's case the court overruled a demurrer to the evidence, which the defendant now assigns for error; and it also complains of the action of the court as to the instructions given and refused, and that the verdict is excessive.

That it is actionable negligence for a railroad company to leave salt or hay on its tracks or near them, whereby cattle are attracted, and killed or injured, has been decided by the supreme court, (*Crafton v. Railroad*, 55 Mo. 580; *Schooling v. Railroad* 75 Mo. 518), and also by the Kansas City Court of Appeals (*Brown v. Railroad*, 27 Mo. App. 394; *Morrow v. Railroad*, 29 Mo. App. 432). This proposition is not denied. But the defendant claims that its demurrer to the evidence ought to have been sustained, because the plaintiff's evidence had no tendency to show that the negligence complained of was that of the defendant, nor that such negligence was the direct cause of the injury complained of. The disposition of this assignment requires a particular reference to the evidence, as we consider the question a very close one.

That the animals belonged to the plaintiff, that they were killed by the trains of defendant at or near Hurricane station, and that they were of the aggregate value of $145, are not matters of dispute. It is also

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conceded, or at least there is no conflict in the evidence, that the defendant's station agent at Hurricane, who was also engaged in a general mercantile business on his own account, stored barrels of salt under a warehouse belonging to the Imperial Milling Company, which warehouse was situated on the defendant's right of way at the station on the west side of and near to the railroad track; that the warehouse was constructed several feet off the ground, and rested on pillars or posts; that some time previous to the accident, in conducting his business as a merchant, he (the agent) had deposited barrels of salt under the warehouse where cattle could get to them, and that one of the barrels was left open. Concerning the killing of the cattle the plaintiff testified that two of them, a heifer and a two-year-old steer, were killed on the night of May 23, and that they were struck at a point between the warehouse and the depot, which were thirty or forty yards apart and situated on the west side of the track; that the other animals were killed on the night of May 25; that one was struck about fifteen or twenty feet south of the wareroom; that another was found dead on the side of the track about three hundred feet south of the warehouse. Plaintiff also testified that he saw cattle tracks under the warehouse, and that the cattle had been licking the salt barrels, but he did not say whether he saw the tracks before or after the first two animals were killed. On his cross-examination, in answer to questions by defendant's counsel, he testified that Morris, who lived at the station and who was a witness for the defendant, told him before and after the first cattle were killed that his cattle were liable to be killed on account of the salt, and that he ought to keep his cattle away from the station.

Morris, the defendant's witness, testified that he told the plaintiff after the first cattle were killed that,

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if he did not take his cattle away, the defendant would kill all of them.

S. B. Smith testified that he was at the station on the morning of the twenty-fifth, and saw the first two animals that were killed; that he found cattle tracks around the warehouse; and that the salt barrels were wet where the cattle had been licking them. This witness also testified that, about two weeks or perhaps a month before the cattle were killed, he bought a barrel of salt from the agent, and that he then saw an open barrel of salt under the warehouse.

William Collins testified that, some time before the cattle were killed, he bought some salt from the agent, and that he got it out of an open barrel under the warehouse; this witness was at the station on the morning of the twenty-sixth of May, after the second lot was killed, and saw fresh cattle tracks around the warehouse.

The plaintiff introduced the agent to prove the killing of the stock, and that he had placed the salt under the warehouse. On cross-examination he testified that the warehouse belonged to the Imperial Milling Company, and that the railroad had nothing to do with it. In answer to a question, whether he had looked for cattle tracks around the warehouse the morning after the first two animals were killed, he answered: "Yes, sir; I did not see anything. I went there the next morning after the killing. I got up in the night, when I heard the train whistle, when it was opposite my house, about where the cattle were killed. The cattle had been there during the daytime; I had run them off. * * * *I knew there would be trouble about it, and the salt would be the first thing*, and I looked where the salt was, and I did not see any tracks. * * * But the morning after the second lot were killed there were tracks there." The witness then stated that, during the day of May 23,

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there had been fifty or sixty head of cattle around the station, and that he had tried to keep them away; that he had chased them off with a dog; that there was one barrel of the salt open; that it was near the outer edge of the warehouse; and that the full barrels were lying on the ground probably ten feet from the outer edge. There was also evidence tending to show that there was very fair grass on the east side of the track within the station limits. The foregoing is believed to be a full statement of the evidence bearing on the cause of the accident.

To authorize a recovery, it was incumbent on the plaintiff to show by substantial evidence that tho alleged act of negligence was the cause of the injury. Circumstantial evidence was sufficient to prove the issue, but such evidence must have been of a character to remove the question from the domain of mere conjecture. Therefore, if, under the evidence, the fair legal inference is not admissible that the cattle were attracted to the station by the salt, and were by reason thereof injured and killed by trains passing along the defendant's road, then the demurrer to the evidence ought to have been sustained for that reason; or, if the evidence is such as to relieve the defendant from legal liability on account of the negligent act of the agent in storing the salt on the right of way, then for *this* reason also the court was wrong in its ruling.

We think that it is a fair inference that two of the last lot of cattle were attracted to the station by the salt, and by reason thereof were killed. Several witnesses testified that cattle had been licking the salt barrels during the nights of the twenty-fourth and twenty-fifth of May. One of the animals was struck near the warehouse, and the other was found dead beside the track about two or three hundred feet south of the warehouse. The third animal was found in an

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adjacent field, and the evidence fails to show at what point it came upon the track or where it was struck. We, therefore, can see no connection between the killing of that animal and the alleged act of negligence.

The evidence as to the first two animals that were killed is not, in some respects, so satisfactory. When struck, they were nearer to the warehouse than the others, but there is no positive proof that cattle had been around the salt barrels during the night or previous thereto. The plaintiff says that he saw cattle tracks around the salt barrels, but he does not say when he saw them—whether before or after the first accident. On the contrary the agent swears that he examined the ground the next morning, but found no cattle tracks in the immediate vicinity of the salt. But we do not consider that the proof of this physical fact was absolutely essential. It is a matter of common knowledge that, when salt is left exposed, it will attract cattle and horses for considerable distances. That fact is entitled to considerable weight in determining this issue. In addition to this we have the testimony of the agent that, on the day preceding the night in which these cattle were killed, the cattle from the neighborhood congregated at the station in large numbers, and that he was compelled to chase them away by putting a dog after them; that, when he ascertained that the cattle had been killed, he went to see if he could find whether or not they had been around the salt barrels. He said: "I knew there would be trouble about it, and the salt would be the first thing;" thus showing that the witness, who was in the best position to know the facts, was of the opinion that the cattle on the previous day had been attracted to the station by the salt. We, therefore, conclude that, as to the first two animals, there was evidence sufficient to authorize the jury to draw the inference that the cattle were attracted to the

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station by the salt, and that they were exposed to danger and killed on account of it. The fact that there was some grass along the east side of the track does not destroy the force of this evidence. It is not probable that cattle would be induced to come to such a place to graze, especially in large numbers, when the grass could not under the circumstances have been very good or wholesome. However, if it were reasonbly doubtful under the evidence whether the grass or the salt attracted the cattle, the defendant would be released altogether, because it was under no obligation to make the grounds around its stations safe pastures for cattle.

It is urged that the agent in storing the salt on the defendant's right of way was engaged in his individual business, and, therefore, the defendant cannot be held. The defendant's liability in this case does not rest on the ground that its station agent, in conducting the defendant's business, created the nuisance, but the agent as to that particular act is to be regarded as a stranger, and then the defendant is held upon the theory that its legal duty is to so police its right of way as to prevent and remove all attractive dangers placed on its tracks or right of way, by its servants or others. Here the nuisance had been of such long standing that it must be presumed that the defendant had knowledge of it.

Neither do we think that the defendant is released from liability on the authority of *Gilliland v. Railroad*, 19 Mo. App. 411, even though it be conceded that the opinion in that case is founded on sound legal principles. The only proof in reference to the warehouse was that it belonged to the Imperial Milling Company. There is nothing to show by what authority it was erected or for what particular purpose or purposes. The only purpose for which it was used, as shown by the evidence, was the storage of salt under it in such a

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way as to prove a dangerous nuisance; which the defendant was in duty bound to abate as soon as it had notice of its existence. This point is not presented in the briefs, but it has suggested itself to the court in the consideration of the case.

Our conclusion is that the demurrer to the evidence was properly overruled, except as to the steer found in Morris' field which the evidence showed was worth $30.

It was averred in the statement, and established by the evidence, that Hurricane station, where the stock was killed, was in Burr Oak township, in Lincoln county. The transcript showed that J. A. Whiteside, before whom the suit was brought, was a justice of the peace for said township. This established *prima facie* the official character of the justice. *Emmerson v. Railroad*, 35 Mo. App. 621; *Rohland v. Railroad*, 89 Mo. 180; *Powers v. Braley*, 41 Mo. App. 556.

In this state the owner of cattle may allow them to run at large (*Gorman v. Railroad*, 26 Mo. 441; *Tarwater v. Railroad*, 42 Mo. 193; *McPheeters v. Railroad*, 45 Mo. 22), and the plaintiff was at liberty to avail himself of this privilege as to his cattle, although he knew that the salt at the station was stored in a place where cattle could get to it. *Brown v. Railroad, supra; Wilson v. Railroad*, 87 Mo. 431. Hence, defendant's instructions numbers 8 and 9 were properly refused.

The plaintiff admitted on his cross-examination that, if he had taken the hides from the cattle killed, he could have realized $7 or $8 from their sale. The court instructed the jury that it was the duty of the plaintiff, unless prevented from so doing by the servants of the defendant, to save any part or parts of the animals killed, and that the value of such parts which could have been saved should be deducted from the value of the cattle. It is evident, from the amount of

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the verdict, that no such credit was given, and to the extent of $7 or $8 it is claimed that the verdict is excessive. We are not prepared to say that a farmer, whose animal has negligently been killed by the cars or by any other agency, is bound to stop his work for the purpose of looking after the carcass. Indeed, we are of the opinion that the law imposes no such duty. If the animal is crippled, he ought to make an effort to save its life, if it is reasonable to suppose that the effort will result in any good. We do not think he ought to be compelled to skin a dead animal, or otherwise make use of the carcass.

If the plaintiff will remit the sum of $30, the value of the animal killed in Morris' field, the judgment for the residue will be affirmed. If the *remittitur* is not made during the term, the judgment will be reversed and the cause remanded. Judge THOMPSON concurs. Judge ROMBAUER dissents, and is of opinion that the decision herein rendered is contrary to the previous decision of the Kansas City Court of Appeals in *Gilliland v. Railroad*, 19 Mo. App. 411, and is opposed to the analogies of other cases on this subject in this state. The case will, therefore, be certified to the supreme court for final determination under section 6 of the constitutional amendment touching the judicial department. So ordered.

ROMBAUER, P. J. *(dissenting)*.—The decision in this case is contrary to the decision of the Kansas City Court of Appeals in *Gilliland v. Railroad*, 19 Mo. App. 411, on both points involved, and, hence, under the constitutional mandate it becomes our duty to certify the case to the supreme court for final adjudication. The plaintiff's witness, Baumeister, testified that the salt was his property; that the warehouse wherein it was stored was the warehouse of the Imperial Milling Com-

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pany; and that the defendant had no control either over the salt or the warehouse. Nor is there any evidence to the contrary in the record; hence, the case is the same as the *Gilliland case* in all its features, except that upon its facts it is one much stronger in favor of the defendant.

While I concede that a railroad company is under an obligation to police its track, so as not to make it extra hazardous to cattle at large (*Crafton v. Railroad*, 55 Mo. 580; *Schooling v. Railroad*, 75 Mo. 518); I cannot concede the further claim that it is under a similar duty as to its right of way outside of its tracks. If such were the law, a railroad company would rest under an obligation to destroy the grass on its depot ground, and on other places adjoining its tracks, wherever its right of way is not fenced, and where it is under no legal obligation to fence it. Grass will attract cattle as well as salt or hay, although the degree of attraction may be different. By the same rule the railroad company would be under obligation to keep out of its warehouses all salt, and restrict by covenants any of its lessees from using sheds on its right of way for the storage of corn or grain or any other material likely to attract cattle. The very fact that cattle have been killed in many instances, attracted to unfenced depot grounds by one or the other of these causes, and that no case can be found which holds the company liable on the theory of a police duty extending over *the entire right of way*, tends to show that no such legal duty exists.

I am further of opinion that no such connection between the storage of the salt and the killing of the cattle was shown, as would warrant the logical inference that the former was the proximate cause of the latter. To warrant such an inference, it would at least be

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necessary to show that the cattle were killed in the immediate vicinity of the salt. As to the cattle killed on the twenty-third, the plaintiff's own evidence shows that no cattle had been to the salt prior to the killing; and, as to the cattle killed on the twenty-fifth, two of them, under all the evidence, were killed at a considerable distance from the salt. None were killed in the immediate vicinity. For aught that appears the cattle may have been in the habit of straying on these grounds without regard to the presence of the salt. All the evidence tends to show such was the fact. If the jury were warranted in inferring that the direct and proximate cause of the killing of four of the cattle was the salt, then they were warranted in inferring that it was the direct cause of killing all of them; because, if we once depart from the limit of the immediate vicinity, we cannot logically fix any other limit, unless we retry the facts. Even then the proper elements for a retrial here are wanting.

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THE STATE OF MISSOURI, Respondent, v. LON C. BEVANS, Appellant.

St. Louis Court of Appeals, December 27, 1892.

1. **Criminal Law:** SALE OF INTOXICATING LIQUOR BY DRUGGISTS. When a druggist sells intoxicating liquor upon the written prescription of a practicing physician, and pleads that fact in defense of a criminal prosecution for such sale, the good faith of the physician who issued the prescription is not material. (THOMPSON, J., *dissents.)*

2. ———: ———: LOCAL-OPTION LAW. The adoption of the local-option law does not displace the law permitting the sale of intoxicating liquor by a druggist upon the written prescription of a practicing physician, and the latter law may, therefore, be invoked by a druggist as a defense to a criminal prosecution under the local-option law.

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Appeal from the Lewis Circuit Court.—HON. BEN. E. TURNER, Judge.

REVERSED AND REMANDED.

Blair & Marchand, for appellant.

No brief filed for respondent.

ROMBAUER, P. J.—The defendant was convicted on an information, charging him with selling to one Shackelford, in Lewis county, intoxicating liquors in violation of the local-option law. The defense interposed was that the defendant was a druggist, and sold the liquors as medicine upon written prescription of a practicing physician. The errors assigned are numerous, but upon an examination of the record we find that the assignments are untenable, except in regard to the ruling of the court hereinafter stated.

The state proved the adoption of the local-option law in Lewis county, and also proved the sale of the liquor by the defendant to Shackelford. The defendant gave evidence tending to show that the sale was made upon the written prescription of a practicing physician. In doing so, he called the physician as a witness. This witness was cross-examined by the state touching the circumstances under which the prescription was issued, and the entire tenor of the cross-examination indicated that the State endeavored to show that the prescription was not issued in good faith, but as a mere blind to avoid the penalties of the law. The defendant objected to this examination, claiming that the evidence was irrelevant, but the court overruled the objection, stating in presence and hearing of the jury: "I think the good faith of this prescription is involved." The defendant objected to this remark of the court, and

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saved his exceptions. The court did not in any of its instructions to the jury withdraw this oral instruction, or tell them in any manner that the good faith of the prescription was not involved. It will be thus seen that the court, both in permitting the cross-examination of the witness on the lines above indicated against defendant's objection, and by its oral remark in hearing of the jury, left the triers of the fact under the impression, that the defendant, a druggist, was responsible for the bad faith of the physician in issuing the prescription. Such is not the law. The physician is made criminally responsible for issuing in bad faith a prescription for liquors as medicine by section 4624 of the Revised Statutes of 1889, but the druggist cannot be made criminally responsible for the bad faith of the physician under any law. Although a prescription is issued in good faith, it does not protect the druggist if he fills it in bad faith; on the other hand, the motives of the physician in issuing the prescription are not relevant evidence in the trial of the druggist. We would have to reverse the case for this error, even if we were satisfied from the evidence that the prescription in this case was a mere blind, and that the defendant was aware of it, connived at it, and knew that the liquor was sold as a beverage. The court might have submitted to the jury the question of the defendant's bad faith in filling this prescription under the testimony of Shackelford, but we are not the triers of the facts.

We are under the constitution bound to follow the decision of the supreme court, which holds in *Ex parte Swann*, 96 Mo. 44, and *State v. Moore*, 107 Mo. 78, that the local-option law and the druggist law may coexist in the same territory, and that a druggist may sell liquors on written prescriptions issued by a practicing physician, even in counties where the local-option law has been adopted. The attention of the supreme court

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does not seem to have been called to the fact that section 4605 of the local-option law only permits the sale of *pure alcohol*, by druggists, and, hence, impliedly prohibits the sale by druggists of intoxicating liquors, other than pure alcohol, under section 4621, in any county where the local-option law has been adopted.

The judgment is reversed and the cause remanded. Judge BIGGS concurs. Judge THOMPSON dissents.

THOMPSON, J. *(dissenting)*.—I dissent, being of opinion that, in the state of the evidence, the good faith of the prescription was involved as a part of the *res gestæ*.

C. N. WILLISON, Appellant, v. DAVID M. SMITH *et al.*, Respondents. 52 133 158s 679 | 52 133 88 43

St. Louis Court of Appeals, December 27, 1892. 52 133 94 1603

1. **Chattel Mortgage:** REPLEVIN BY HOLDER OF NOTE FOR COLLECTION. After condition broken, the mortgagee may maintain an action of replevin for the property covered by a chattel mortgage, and this right passes to the indorsee of the note secured by the mortgage, though he holds it only for collection.

2. **Promissory Note:** IMPLIED AUTHORITY TO INDORSE IN NAME OF PAYEE. One who is authorized to collect a promissory note for the payee, but himself resides at a point far distant from the place of payment, has implied authority to indorse it in the name of the payee to a resident of the place of payment for collection.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

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Edmond A. B. Garesche, for appellant.

Robert W. Goode, for respondents.

Rombauer, P. J.—The plaintiff brought an action of replevin for the possession of certain household furniture. The action was brought before a justice of the peace, and upon its trial anew in the circuit court the plaintiff was nonsuited. An inquiry of damages was thereupon had in favor of defendants, the jury assessing the value of the property at $175, and the damages for its detention at $76.50. Judgment was rendered accordingly. Error is assigned by the plaintiff, appealing on both branches of the case.

It appeared in evidence that, on June 24, 1890, the defendants made a negotiable promissory note for $81.25, payable to the order of E. R. Mackey on July 24, 1890, at the office of the Missouri Mortgage Loan Company in St. Louis, and secured the note by chattel mortgage on the property in controversy. The plaintiff is an employe of the Missouri Mortgage Loan Company, and held this note for collection in August, 1891, and for some time prior thereto. The note remaining unpaid, the plaintiff instituted this suit of replevin.

The only ground on which the plaintiff could have been nonsuited was his failure to show such title to the note in himself, as would entitle him to maintain an action at law thereon in his own name. If he could maintain an action at law on the note, it necessarily results that he could maintain an action at law on the mortgage, which, under the decisions in this state, is a mere incident to the note. *Thayer v. Campbell*, 9 Mo. 280; *Anderson v. Baumgartner*, 27 Mo. 80; *Potter v. Stevens*, 40 Mo. 229. After condition broken, the legal title to the property mortgaged is in the mortgagee (*Lacey v. Giboney*, 36 Mo. 320; *Johnson v.*

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Houston, 47 Mo. 227), and, in case of assignment of the mortgage debt, in the assignee.

It appeared in evidence that the plaintiff did not know E. R. Mackey, the payee, personally, and had no correspondence with him of any kind; and that this note was transmitted from St. Louis to one F. J. Mackey in Chicago, who, as far as the evidence shows, had charge of nearly all of E. R. Mackey's business consisting of claims and collections. When the note was returned to the plaintiff from Chicago, it bore an indorsement of the name of E. R. Mackey, which indorsement was written by F. J. Mackey. It also appeared that F. J. Mackey gave special verbal instructions to the plaintiff in regard to this note and mortgage, and its enforcement. It further appeared that, in the suit before the justice, E. R. Mackey was made a coplaintiff in this suit, and his name is signed to the recognizance of appeal as that of a principal. On the trial in the circuit court, however, his name was withdrawn as a plaintiff.

We must hold that upon this showing the plaintiff was improperly nonsuited. It has always been the law of this state that a holder of a note may maintain an action at law thereon in his own name. *Boeka v. Nuella*, 28 Mo. 180; *Bennett v. Pound*, 28 Mo. 598; *Willard v. Moies*, 30 Mo. 142; *Lewis v. Bowen's Adm'r*, 29 Mo. 202; *Harvey v. Brooke*, 36 Mo. 493; *Davis v. Carson*, 69 Mo. 609. It is immaterial whether the note is negotiable or not negotiable (*Spears v. Bond*, 79 Mo. 467), or whether the holder holds it for collection merely. *Webb v. Morgan*, 14 Mo. 430; *Beattie v. Lett*, 28 Mo. 596; *Simmons v. Belt*, 35 Mo. 461; *Jefferson Savings Association v. Morrison*, 48 Mo. 273.

As far as the evidence shows, this note never was in the possession of E. R. Mackey, except in so far as it was in the possession of his agent, F. J. Mackey. As

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F. J. Mackey was a resident of Chicago, if he had any authority to collect this note (which fact is not disputed), he had authority to indorse it for collection to some one in St. Louis, where the note by its terms was payable. Under the law of agency, such authority is implied under the circumstances, even though the agent has no authority to make his principal liable as an indorsee by such indorsement. Mechem on Agency, secs. 194, 195; Wharton on Agency, secs. 31, 32. Having so indorsed it, the agent in St. Louis became under all the authorities in this state a holder for collection, and could maintain an action at law on the note in his own name, and after condition broken on the mortgage, subject of course to all the equities which the payee has against the true owner. The fact that E. R. Mackey appears to be a usurer, and that the plaintiff has lent himself to the enforcement of an oppressive bargain, cannot change the applicatory law.

On the second branch of the case the court committed error in instructing the jury to find damages for detention, when no such damages were shown, and in sustaining the finding of $76.50 for such damages. As the judgment must be reversed for error on the main issue, we mention this matter merely to avoid the repetition of such errors in similar cases.

Judgment reversed and cause remanded. All the judges concur.

HENRY P. MANTZ AND ELIJAH S. WILLIAMS, Respondents, v. JOHN MAGUIRE, JOHN H. MAGUIRE AND WILLIAM A. MAGUIRE, Appellants.

St. Louis Court of Appeals, December 27, 1892.

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1. **Law and Fact:** CONSTRUCTION OF WRITING. **The interpretation of writing is always for the court, except, *first,* where the writing is**

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ambiguous and the ambiguity must be solved by extrinsic unconceded facts, and, *secondly*, where the writing is merely adduced as containing evidence of certain facts from which different inferences may be drawn, and where it is for the jury and not for the court to draw the inferences; and *held* that the writings in question in this cause were within neither of these exceptions.

2. **Value of Realty:** COMPETENCY OF WITNESS. A real-estate agent, who testifies that he has made a particular study of the values of property in a certain locality, is a competent witness in regard to the value of a lot in that locality, though he is unable to give instances of actual sales at definite figures.

3. **Practice, Appellate:** CHANGE OF THEORY OF TRIAL. A party cannot try his case on one theory in the trial court, and upon another on appeal.

4. ———: ———. In this cause the defendants were sued for damages for the want of authority on their part to make a written contract for the sale of land, which they had entered into as the agents of a third person. They pleaded only the general issue, raised no objection to evidence of the contract, made no specific objection to its validity, and themselves offered evidence with the view of showing authority on their part to make it. Held, *per curiam*, that they were not at liberty to contend on appeal that the contract was insufficient under the statute of frauds.

5. ———: ———. But *held* by BIGGS, J., *dissenting*, that the question of the validity of the contract under that statute was sufficiently raised by the asking of an instruction limiting the recovery of the plaintiffs to the amount of earnest money paid by them, since that was the extent of the right of recovery, if the contract was invalid.

6. **Statute of Frauds:** SUFFICIENCY OF MEMORANDUM: VALIDITY AGAINST UNNAMED PRINCIPAL. When the memorandum of a contract for the sale of realty is entered into by one of the parties thereto as agent for a third person who is not named therein, and this appears upon the face of the memorandum, parol evidence is admissible, notwithstanding the statute of frauds, to show who the unnamed principal is for the purpose of binding him.

Per Biggs, J., dissenting:

7. **Principal and Agent:** IMPLIED WARRANTY OF AUTHORITY OF AGENT: DAMAGES. One who enters into a contract as the agent of another person impliedly warrants his authority to act; but where he acts without authority the other contracting party is not entitled to damages for the loss of the bargain, if the contract would have been insufficient to bind the principal, even if authorized, as where it fails to satisfy the requirements of the statute of frauds.

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8. **Statute of Frauds: MEMORANDUM OF CONTRACT FOR THE SALE OF REALTY. A memorandum of a contract for the sale of realty is insufficient under the statute of frauds, if it fails to name or describe the vendor; such deficiency cannot be supplied by oral evidence showing who the vendor is.**

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

Kehr & Tittmann and *Joseph H. Zumbalen*, for appellants.

(1) The contract of sale would not have bound the principal if the agents had authority to make it, because it fails to disclose the vendor. *Schenck v. Co.*, 47 N. J. Eq. 44: *Clampet v. Bells*, 39 Minn. 272; *O'Sullivan v. Overton*, 56 Conn. 102; *Nichols v. Johnson*, 10 Conn. 198; *Mentz v. Newwitter*, 122 N. Y. 491; *Mayer v. Adrian*, 77 N. C. 83; *Ross v. Allen*, 45 Kan. 231; *Repetti v. Maisak*, 6 Mack. 368; *Grafton v. Cummings*, 99 U. S. 100; *Champion v. Plummer*, 1 Bos. & P. (N. R.) 252; *Boeckler v. McGowan*, 12 Mo. App. 507; Bishop on Contracts [Ed. 1887.] sec. 1070; *Huntington v. Knox*, 7 Cush. 374; *Murray v. Armstrong*, 11 Mo. 209; *Potter v. Bassett*, 35 Mo. App. 418. Hence, there can be no recovery against the agents, even if they were not authorized to make the sale. *Ding v. Parker*, 52 N. Y. 494; *Baltzen v. Nicolay*, 53 N. Y. 467; Mechem on Agency, sec. 548; Wharton on Agency, sec. 534. (2) The letters from Taylor to the appellants conferred upon them full authority to sell the property. *Smith v. Allen*, 86 Mo. 178; *Lyon v. Pollock*, 99 U. S. 668. The sale actually made was within the authority conferred. (3) The contract was binding upon Taylor although made by the firm of Maguire & Co., if one member of the firm had authority to make

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it. The power of attorney to John Maguire was not revoked by the letters from Taylor to Maguire & Co. The appellants were not estopped from relying upon the power of attorney. There can be no estoppel *in pais*, where one has acted under a mistake as to his rights, or where the representation has not been acted upon, or where it does not appear that injury would result by permitting the truth to be shown. *Taylor v. Zepp*, 14 Mo. 489; Bigelow on Estoppel, 493; *Spurlock v. Sproule*, 72 Mo. 509; *Monks v. Belden*, 80 Mo. 642; Bigelow on Estoppel, 571, note 2. The question of estoppel *in pais* is one of fact for the jury. *Monks v. Belden*, 80 Mo. 642; *Co. v. Renfroe*, 58 Mo. 265. (4) The question of revocation of the power of attorney based upon the subsequent letters of Taylor was one of fact, and should have been submitted to the jury. *Huth v. Railroad*, 56 Mo. 206; *Primm v. Haren*, 27 Mo. 405; *Reynolds v. Richards*, 14 Pa. St. 205. (5) The witness Dunnerman was not competent to testify to the market value of the property. *Whipple v. Walpole*, 10 N. H. 131.

Pollard & Werner, for respondents.

(1) The first point made by counsel for appellants in their brief is that the contract of sale would not have bound the principal if the agents had authority to make it, because it fails to disclose the vendor. In Missouri the question is settled adversely to the proposition of counsel for appellants. *Hartzell v. Crumb*, 90 Mo. 629–639; *Kelly v. Thuey*, 102 Mo. 522. But a complete answer to this point is, that it does not arise on the record. The real objection is that the agreement was not a sufficient memorandum to bind Taylor or anybody under the statute of frauds, on the ground that it did not disclose the name of the party

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for whom the agents acted as principal, that is, the name of the party who was selling the land, and that this could not be supplied by parol evidence. No such question was presented to the circuit court, either by plea or by objection to the evidence. This is a court for the correction of errors, and it can only review decisions of the lower court. *Scharff v. Klein*, 29 Mo. App. 549; *Penninger v. Reilley*, 44 Mo. App. 255; *Lammer v. McGeihan*, 43 Mo. App. 664. (2) The second point is, that the letters from Taylor did confer authority upon appellants to make the contract. The cases cited certainly are unlike the one before the court. We ask the court to read the letters at length as they appear in the record. The idea running through them all is that propositions to sell are to be submitted to Taylor. If they furnished authority to sell at all they did not authorize a sale on credit. A simple authority to sell means a sale for cash, and not on credit. Mechem on Agency, sec. 325. (3) The power of attorney given to John Maguire afforded no authority for the contract of sale. It did not authorize a sale on credit. Mechem on Agency, sec. 325. The evidence also shows that the defendants did not act under this power. Again this power of attorney was revoked or modified by the subsequent letters. Finally, the appellant is estopped from invoking this power of attorney. It would be a strange thing if these parties could be permitted to go into the Taylor case, and by producing these letters and swearing that they were the authority upon which they acted, thus defeating that case on the ground of a want of authority, and then, when they are sued on the ground that they had acted without authority, be allowed to come in and defeat this by setting up another and different authority, which it is not pretended that they were acting upon, or even remembered. We think they are estopped from doing this.

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Guffey v. O'Reiley, 88 Mo. 418; *Loaning Ass'n v. Kehlor*, 7 Mo. App. 158; *Baley v. Williams*, 73 Mo. 310. (4) The fourth point is the question as to whether the letters were a revocation of the power of attorney. This was purely a legal question, as it was to be determined by an inspection of the papers. (5) The next point is that Dunnerman, a witness for plaintiff, was not competent to testify as to values. It is not necessary that a witness who testifies that he knows the value of property be able to state that he knows of sales to render him a competent witness as to values. *Clay Works v. Ellison*, 30 Mo. App. 67, 86; *Railroad v. Calkins*, 90 Mo. 538, 543.

Rombauer, P. J.—The cause of action stated in the petition is to the effect that, on the fifth day of June, 1890, the defendants, claiming to act as the agents of one George R. Taylor, and claiming to have authority from him to do so, entered into a written contract with the plaintiffs for the sale of certain lots belonging to Taylor in the city of St. Louis, in which the plaintiffs agreed to pay for the property the sum of $3,000 upon the terms set forth in the contract; that it was stipulated that the property should be conveyed to the plaintiffs by warranty deed, free from all liens, except the taxes of 1891. The contract, which is filed with the petition, reads:

"St. Louis, June 5, 1890.

"Received from E. S. Williams and H. P. Mantz the sum of $50 in part payment of the purchase money for the following described property, to-wit: Lots 42, 43 and 41, fronting seventy-five feet south side of Walnut street, by a depth of one hundred and fourteen feet and three-twelfths feet, in city block number 1699, this day sold to E. S. Williams and H. P. Mantz for $3,000, to be paid as follows: $1,000 cash,

the $2,000 balance to be paid in one and two years, privilege to pay same any time before maturity, secured by deed of trust on property, with interest at the rate of six per cent. per annum on deferred payments. Should the title prove defective beyond remedy, then this contract shall be void, and the $50 hereby paid shall be returned to said E. S. Williams and H. P. Mantz and examination fee paid by seller. Title to be conveyed by warranty deed, excepting taxes for the year 1891, and all taxes thereafter, which purchaser assumes to pay. It is hereby agreed that, if said E. S. Williams and H. P. Mantz do not make cash payment of $950 within ten or fifteen days from the date hereof, then this contract to be absolutely void and no longer binding between the parties hereto, if so determined by the seller herein; and the $50 payment hereon is to be forfeited as liquidated damages for the purchasers' failure to execute this contract.

"Witness our hands hereto and in duplicate hereof this fifth day of June, 189–.

"JOHN MAGUIRE & Co.,
"Agents, by WM. A. MAGUIRE, [Seal]
"E. S. WILLIAMS, [Seal]
"H. P. MANTZ. [Seal]"

It is then averred that the plaintiffs paid the $50 earnest money when the contract was delivered, and that they were ready and offered within the time specified to perform all other things required of them under the contract, but that Taylor refused to carry it out, claiming that the defendants had no authority to bind him in a contract for a sale of the lots. The plaintiffs further allege that thereafter they instituted a suit against Taylor for specific performance of this contract, in which action they were defeated on the ground that the defendants had no legal authority to make the sale. The petition then concludes by aver-

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ring a want of authority in the defendants to make the contract; that the lots at the time of the breach were worth $5,000, and that the plaintiffs were damaged on account of the refusal of Taylor to complete the sale in the sum of $2,500. The answer was a general denial. The cause was tried by a jury and resulted in a verdict and judgment for plaintiffs for $1,251.25. The defendants have appealed.

The plaintiffs gave evidence upon the trial tending to show that the defendants in negotiating the sale, in question, acted as agents of George R. Taylor, and that such fact was known to the plaintiffs, all of which evidence was admitted without any objection. The plaintiffs also gave in evidence a number of letters written to the defendants by George R. Taylor, their principal, from which it appeared that the sale evidenced by the memorandum was beyond their authority, as they were neither authorized to conclude a bargain without first submitting it to their principal, nor authorized to sell on credit. It was shown that, in the action for specific performance brought by the plaintiffs against Taylor, the defendants were requested to produce whatever authority they had from Taylor to make this sale, and had produced these letters as showing such authority, and that one of the defendants testified in that suit that such letters contained all the authority they had. These letters were written in the fall of 1889 and spring of 1890. The plaintiffs also gave evidence showing a difference, in excess of the verdict actually recovered, between the market value of the property mentioned in the memorandum and its price as stated in the memorandum.

The defendants offered evidence tending to show that the difference between the market price of the property and the price mentioned in the memorandum was trivial, if there was any. The defendants then

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offered in evidence a power of attorney, not under seal, executed by George R. Taylor to John Maguire in August, 1887, and before the firm of John Maguire & Co. was formed, giving him general power to sell the land in controversy, but containing no authority to sell on credit. This power of attorney gave to John Maguire power of substitution, but it did not appear that he had ever exercised such a power, nor did it appear that the member of the firm, who actually negotiated the sale, had any knowledge of its existence. The plaintiffs objected to the introduction of the power in evidence on the grounds, among others, that it was a power to John Maguire individually, and could not be exercised either by the firm or any other member of it; that it conferred no authority even on John Maguire to make a sale on credit, and that the subsequent correspondence between Taylor and the firm was tantamount to a revocation of the power, conferred upon John Maguire by it, and that these were questions of law for the court, as all the writings were before the court. The court excluded the power of attorney, and the defendants excepted. The defendants also offered in evidence a letter written by them to George R. Taylor five days after the date of the memorandum of sale, covering the deed to the plaintiffs and notes executed by them for deferred payments, and stating, among other things: "If you want cash for the property we can *probably* cash the notes for you without any trouble." This letter the court also excluded, and the defendants excepted.

The defendants, at the close of the plaintiffs' evidence, asked an instruction in the nature of a demurrer to the evidence, and, at the close of the entire case, they asked for a further instruction that the plaintiffs could not recover in excess of the $50 earnest money paid, and interest thereon. They also

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asked this instruction: "If the jury find from the evidence that the defendants had authority in writing from George R. Taylor to sell the lots described in the petition, then the verdict must be for the defendants." The court refused these instructions, and upon its own motion charged the jury as follows:

"Gentlemen of the jury: There is no evidence before you in this case that the defendants, at the time they executed the contract for the sale of the lots on Walnut street, mentioned in the evidence, dated June 5, 1890, and read in evidence, had any legal authority from the owner thereof to sell the same in manner and form, or upon the terms stated in said contract.

"If you believe from the evidence that, in making said contract, the defendants as a firm, or either of them acting in the firm name of John Maguire & Co., acted for Geo. R. Taylor, and that the plaintiffs so understood it at the time of the transaction; and if you also believe from the evidence that Geo. R. Taylor was at the time the owner of the property described in said contract; and if you also believe from the evidence that, within ten or fifteen days after the fifth day of June, 1890, the plaintiffs were ready and able and willing to comply with the terms of said contract on their part, and that they demanded from said defendants a deed for the property executed by said George R. Taylor, and then offered to comply with the said contract on their part, but that defendants, or some one of them, informed the plaintiffs that they could not comply with said contract, because the said Taylor refused to execute or deliver such deed for said property, then the plaintiffs are entitled to recover.

"And, in such case, you should assess the plaintiffs' damages at the sum of $50, with interest thereon at the rate of six per cent. per annum from August 15, 1891 (the date when the suit was instituted), to this date.

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"And if you find and believe from the evidence that the fair and reasonable market value of the property mentioned in the evidence and in said contract of June 5, 1890, was on the day when said plaintiffs demanded such deed therefor, if you find from the evidence that such demand was made before June 20, 1890, was greater than the price fixed by said contract, then you should add to the sum of $50, and interest above mentioned, such additional sum as you may find and believe from the evidence that the fair and reasonable market value of the property exceeded said contract price.

"By the term market value is meant such sum as property will bring in the market, when offered for sale by an owner who is willing, but is not obliged, to sell to purchasers who are willing, but are not obliged, to buy the property."

The errors assigned are that the court erred in its rulings on the evidence and instructions.

Before proceeding to the examination of those questions of law, which one member of the court claims arise upon the record, we will dispose of those propositions of law which we can decide with unanimity, as properly raised by the record. We are all of opinion that the court did not err in rejecting the power of attorney in evidence, nor in rejecting the defendant's letter written to Taylor five days after the date of the memorandum. The defendants contend that the interpretation to be put upon the power and letters of Taylor raised a question of fact for the consideration of the jury, and, in support of that claim, refer us to *Primm v. Haren*, 27 Mo. 205, and *Huth v. Railroad*, 56 Mo. 202. The interpretation of writings is always for the court, except in two cases: *First*, where the writing is ambiguous, and the ambiguity must be solved by extrinsic unconceded facts, and, *next*, where the

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writing is merely adduced as containing evidence of certain facts, from which different inferences may be drawn, and where it is for the jury and not the court to draw the inferences. Those were the questions decided in the cases cited. No such question arises in the case at bar. Laying all other considerations out of view, it must be evident that neither the power of attorney nor the letters authorized a sale by the defendants on credit. Mechem on Agency, secs. 325, 358; *State v. Bank*, 45 Mo. 528, 538, and cases cited. The defendants' letter to Taylor, written some time after the sale, that they could *probably* cash the notes without any trouble, was not an offer to pay cash for the notes, conceding that such offer would have been availing.

The plaintiffs called as a witness as to values one Dunnerman, a real-estate agent in the city, who testified that he made the value of property in that locality a particular study, but who could not give instances of actual sales at definite figures. This witness placed the value of the property at the date of the memorandum at $75 per foot. His evidence was objected to on the ground that he had not properly qualified. The objection was properly overruled. Testimony as to value in such cases is matter of opinion, and the witness, under the rule stated in *St. Louis Ry. Co. v. Calkins*, 90 Mo. 538, 543, and cases there cited, was competent to give an opinion; its weight was for the jury. As the result shows, the jury did not attach much weight to the testimony of this witness, since their award of damages is less than any of the plaintiffs' witnesses on that subject testified to.

Nor is there any force in the objection, that it was not shown that George R. Taylor had any title to this property. John Maguire, one of the defendants, testified that the lots belonged to Taylor; that he had

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charge of the property for twenty years; that Taylor inherited the property from his father, who died in 1880, and there was not even any countervailing evidence on that question. The measure of damages, therefore, under the rule laid down by the supreme court in *Hartzell v. Crumb*, 90 Mo. 629, was correctly stated in the instructions of the court to the jury.

The foregoing considerations, in the opinion of the majority of this court, dispose of every question which is properly raised on the record before us. They necessarily lead to the affirmance of the judgment. As, however, one of the members of the court is of opinion that other questions do properly arise upon this record and are decisive in favor of the defendants, we will enter into consideration of those questions for the purpose of showing that they do not properly arise upon the record and for the purpose of showing further that, even if they were properly raised, the defendants could not derive any benefit therefrom. We pursue this course because the questions thus mooted are of the gravest importance, affecting the practice both in trial courts and on appeal.

It was argued by the counsel for the defendants for the first time in this court that the memorandum of sale, forming the foundation of plaintiffs' cause of action, was not a sufficient memorandum under the statute of frauds to show a contract on the part of Taylor, because such memorandum did not state the name of the owner of the property. It was further argued that this point was sufficiently raised in the court below by a plea of the general issue, and a demurrer to the evidence. In answer to this argument a majority of the members of the court hold that the question, whether the memorandum was sufficient, cannot be raised in this court for the first time; that the defense of the statute of frauds was not properly raised

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in the trial court, and that, even if raised, it would have been unavailing.

It is a salutary rule of appellate procedure, sanctioned by a long line of uniform decisions in this state, that the appellant cannot try his case on one theory in the trial court and upon another theory on appeal. *Trigg v. Taylor*, 27 Mo. 245; *Capital Bank v. Armstrong*, 62 Mo. 59, 65; *Walker v. Owen*, 79 Mo. 563; *Wheeler v. Ins. Co.*, 6 Mo. App. 235; *Barker v. Berry*, 8 Mo. App. 446; *Nance v. Metcalf*, 19 Mo. App. 186.

But, even if the defendant could be heard to raise for the first time in this court an objection to evidence offered in the trial court, and even if they could be permitted to first prove a contract orally in the trial court themselves, and then come into the appellate court and say the contract is not proved because it has not been established by written evidence (which the majority of the court holds cannot be done), still the defendants must fail, because, in the opinion of the majority of this court, the rule stated in *Higgins v. Senior*, 8 Mees. & W. 834, is the law of this state. In that case Mr. Baron Parke, in delivering the opinion, said: "There is no doubt that where such an agreement is made it is competent to show that one or both of the parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal."

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Judge LEONARD, whose learning has reflected great credit on the bench of this state, in the case of *Higgins v. Dellinger*, 22 Mo. 397, 400, not only adopts this statement of the law as announcing a correct principle, but also adopts the statement of Judge PORTER in *Hopkins v. Lacouture*, 4 La. Ann. 64, that the liability of the principal depended on the act done, and not on the form in which it is executed. The only difference is that, where the agent contracts in his own name, he adds his personal responsibility to that of the person who has empowered him. In *Briggs v. Munchon*, 56 Mo. 467, 472, the rule in *Higgins v. Senior* is again set out in full and expressly approved, and so in the late case of *Kelly v. Thuey*, 102 Mo. 522, 528, where the learned judge delivering the opinion states that it has been approved in this state and in other jurisdictions. The rule was held inapplicable in the last case, because the covenants contained in the memorandum were those of the agent; because there was nothing to show that the grantor knew who the real principal was, and because to have substituted the name of the principal for that of the agent would have been to make an entirely different contract for the parties than they had made themselves.

In the case at bar the memorandum is not under seal, and the technical rule which prevents an agent from binding his principal under seal, when he has no authority under seal himself, has no application. The memorandum upon its face discloses that the defendants were contracting as agents. The evidence that they did contract as agents, which is not only not objected to, but offered in a great measure by themselves, in no way contradicts the memorandum. On what conceivable theory the proof thus offered failed to show that they intended to bind their principal, and

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did bind him as far as they had power to do so, passes our comprehension.

Judgment affirmed. Judge THOMPSON concurs. Judge BIGGS dissents.

BIGGS, J. *(dissenting)*.—The majority of the court are of the opinion that the plaintiffs were entitled to recover for the loss of their bargain, and that the circuit court was justified in so instructing the jury. To this I cannot agree. The action is one for the breach of an implied warranty of authority by the defendants as agents of Taylor to make the contract set forth in the petition. If the defendants assumed to act for Taylor without having authority to do so, they would be answerable in this action for whatever amount had been paid on account of the pretended contract. But whether they must also answer to plaintiffs for the damage sustained by reason of the loss of a bargain, must depend upon the sufficiency of the memorandum to bind Taylor but for want of such authority. All the authorities hold this. In the case of *Dung v. Parker*, 52 N. Y. 494, the defendant falsely represented that he had authority to act as agent for another, and made a parol contract for the leasing of a store to plaintiff for two years, in consequence of which the plaintiff incurred expense in procuring fixtures, etc. The owner of the storeroom refused to execute the lease, and the plaintiff instituted the action for damages. The court of appeals, in its opinion, said: "In this case it is to be assumed, from the finding of the jury, that the defendant made a contract to lease the premises without authority. But the contract was by parol; and, if the defendant had possessed authority to make it, it would have conferred no right upon the plaintiff. The plaintiff has not been injured by the misrepresentation, and has lost nothing, for he

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would have gained nothing if the representation had been true. He cannot say that he was defrauded, and make that the substantive ground of his recovery, because he had no right to rely upon a contract which, when made, the law declared to be void. If he incurred expenses on the faith of the promise, or relying upon the express assurance of the defendant that the corporation would sanction the contract, it is his misfortune, but it furnishes no ground of action."

The same principle is clearly enunciated in a decision by the same court in a subsequent case (*Baltzen v. Nicolay*, 53 N. Y. 467), where it was said: "When an agent makes a contract beyond his authority, by which the principal is not bound, by reason of the fact that it was unauthorized, the agent is liable in damages to the person dealing with him upon the faith that he possessed the authority which he assumed. The ground and form of his liability in such a case has been the subject of discussion, and there are conflicting decisions upon the point; but the later and better considered opinion seems to be that his liability, when the contract is made in the name of his principal, rests upon an implied warranty of his authority to make it, and the remedy is by an action for its breach. *Collins v. Wright*, 8 E. & B. 647; *White v. Madison*, 26 N. Y. 117; *Dung v. Parker*, 52 N. Y. 494. The reason why the agent is liable in damages to the person with whom he contracts, when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal. The contract, though in form the contract of the principal, is not his in fact, and it is but just that the loss occasioned by there being no valid contract with him should be borne by the agent who contracted for him without authority. In order to make the agent liable in such a case, however, the unauthorized contract must be

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one which the law would enforce against the principal if it had been authorized by him *(Dung v. Parker, supra)*, otherwise the anomaly would exist of giving a right of action against the assumed agent for an unauthorized representation of his power to make a contract, when the breach of the contract itself, if he had been authorized to make it, would have furnished no ground of action. That the agent who makes a contract for an undisclosed principal is personally bound by it, although the party dealing with him may know the general fact that he is acting as agent, is well-settled; nor does the fact that the agent is an auctioneer, and that the contract arises upon a sale by him as such, withdraw it from the operation of the rule. * * * The plaintiffs, upon the case made, must recover, if at all, upon the basis of the existence of a contract, valid in form, for the purchase of stock. If they rely on the false warranty of authority by the defendant, then, if the contract was invalid within the statute of frauds, they can recover nothing, for, in a legal sense they have sustained no injury. If they say that the contract was the personal contract of the defendant, he has a right to interpose the statute as his defense."

So in this state the supreme court in the case of *Lydick v. Holland*, 83 Mo. 703, decided that, when a contract could not be specifically enforced because of the statute of frauds, damages could not be allowed for its breach.

Now it is quite clear that the memorandum read in evidence by the plaintiffs is of itself insufficient as a contract for the sale of the lots, because, under all the authorities, the vendor must be named or described in the writing. *Hartzell v. Crumb*, 90 Mo. 629; *Kelly v. Thuey*, 102 Mo. 522; *Einstein v. Holt*, 52 Mo. 340; *Boeckeler v. McGowan*, 12 Mo. App. 507; *Fenly v.*

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Stewart, 5 Sandf. (N. Y.) 101; *Schenck v. Spring Lake Co.*, 47 N. J. Eq. 44; *Clason v. Bailey*, 14 John. 484; *The First Baptist Church v. Bigelow*, 16 Wend. 28; *Calkins v. Faulk*, 39 Barb. 620; *Wright v. Weeks*, 25 N. Y. 159; *Drake v. Seaman*, 97 N. Y. 230; *Grafton v. Cummings*, 99 U. S. 100; *Martin v. Flowers*, 8 Leigh, 158; *Townsend v. Hubbard*, 4 Hill, 351; *Squier v. Norris*, 1 Lans. (N. Y.) 282; *Stackpole v. Arnold*, 11 Mass. 27; *Clampet v. Bells*, 39 Minn. 272; *Champion v. Plummer*, 4 B. & P. 253; *Williams v. Lake*, 29 L. J. Q. B. 1; *Mayer v. Adrian*, 77 N. C. 83; *Nichols v. Johnson*, 10 Conn. 198; *O'Sullivan v. Overton*, 56 Conn. 102; *Mentz v. Newwitter*, 122 N. Y. 491.

It will be observed that the instrument which we have here not only fails to name Taylor, but it does not in the remotest way name or refer to anyone as the vendor. It is clear that the paper, as written, obligated no one to convey, and the question which arises on this record is, whether it was competent to help out the instrument in this respect by oral evidence to the effect that Taylor was the real vendor. The majority opinion holds that, under the decisions in this state, which follow the *dictum* of the English court of exchequer in the case of *Higgins v. Senior*, 8 M. & W. 833, such evidence was admissible. In that case the defendant Senior, who had entered into a written contract in his own name for the sale of goods, undertook to discharge himself by showing that in making the contract he acted for a principal known to the plaintiff though not named in the contract, and that he, therefore, incurred no personal liability. The court held, and correctly so, that such evidence was incompetent for the reason that it contradicted the written instrument. But Park, J., who delivered the opinion, said *arguendo:* "There is no doubt that, where such an agreement is made, it is competent to show that one or

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both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent in signing the agreement, in pursuance of his authority, is in law the act of the principal." Some of the American courts have given the English rule a qualified recognition by confining its application to simple contracts, other than negotiable instruments. *Nash v. Towne*, 72 U. S. 689; *Bank v. Hooper*, 5 Gray, 567; *Salmon Fall Mfg. Co. v. Goddard*, 14 How. 454. But the greater number of the cases repudiate the rule altogether, holding that the admission of oral evidence in such cases is incompetent, as tending to vary the writing. *Schenck v. Spring Lake Co., supra; Stackpole v. Arnold, supra; Clampet v. Bells, supra; Mentz v. Newwitter, supra; Clason v. Bailey, supra; Grafton v. Cummings, supra; Fenly v. Stewart, supra; Pentz v. Stanton*, 10 Wend. 271.

The supreme court of this state, however, seems to have adopted the English rule, which, stated in the broadest terms, is to the effect that, if A contracts to sell land, it is competent to show by oral evidence that *his* individual undertaking was in law the undertaking of B, for whom he acted as an authorized agent. It is thought that such evidence in no way adds to or varies the writing, but only tends to show that some one else, other than the parties to the contract, is bound by it. This reasoning was never satisfactory to me. But how the rule can be extended to a case like we have here, where

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no vendor is named, and there is nothing in the writing itself *obligating anyone* to make a conveyance, passes my comprehension. All the books say that it is essential in such a contract to name or describe the vendor and vendee; to describe the land so that it may be identified, and also to state the terms of the sale. These are the requisites. Now if it be competent to piece out such a contract by showing orally who the vendor is, where none is named, then in like manner the name of the vendee may be supplied, also the terms of the sale, and the description of the land, thus entirely uprooting the statute requiring such contracts to be in writing.

But it is argued by my associates that the sufficiency of the contract is assailed for the first time in this court. I take a different view. The sufficiency or insufficiency of the contract only became material in determining the measure of damages. If the memorandum was sufficient to bind Taylor, and the defendants were not authorized to bind him in such a contract, then the defendants were bound to answer in damages for the difference, if any, between the market value of the property at the time of the sale and the agreed price. But, on the other hand, if the contract was insufficient for the purpose stated, then the amount of the recovery ought to have been confined to the amount of money paid on account of the contract, whether the defendants had authority to make the sale or not. The defendants asked the court to declare as a matter of law that the plaintiffs' recovery could not under the evidence exceed the sum of $50, which was the amount paid by the plaintiffs on account of the alleged purchase, which instruction the court refused, and the defendants excepted. In this way the sufficiency of the contract was challenged, and, in my judgment, it was the only proper way to raise the question.

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Neither do I think, as has been stated in the majority opinion, that the course pursued by the defendants at the trial is inconsistent with the theory that the contract was insufficient. The defendants attempted to show on the trial that they had written authority from Taylor to make the sale, and their counsel argue in this court that the letters from Taylor to them and the old power of attorney to one of the defendants constituted such authority. By this evidence, and by the instruction asked, the defendants attempted to avoid liability for the loss of bargain on two grounds: *First.* That the defendants had authority from Taylor to make the sale. *Second.* If the court found that they possessed no such authority, then such special damages could not be recovered, because the paper executed by the defendants and accepted by the plaintiffs was not a valid contract for the sale of the lots. I can see no inconsistency in this.

For the foregoing reasons I have been unable to agree with my associates as to the proper disposition of this case. I think that the plaintiffs are entitled to a judgment for $50 and interest, and no more.

JOHN A. WARREN *et al.*, Respondents, v. THE MERCHANTS EXCHANGE OF ST. LOUIS, Appellant. 52 157 164s 19[illegible]

St. Louis Court of Appeals, December 27, 1892.

1. **Merchants Exchange:** NEGLIGENCE OF CLERK: SUFFICIENCY OF EVIDENCE. Auction sales were made at the call board of a merchants exchange among the members thereof, and it was the duty of a clerk to keep a record of them; but the accurate performance of this duty was extremely difficult, since bidding was very rapid and great confusion attended the transactions. *Held,* that the failure of the clerk to record a sale warranted a finding of negligence on his part.

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2. ———: ———: EVIDENCE OF CONTRIBUTORY NEGLIGENCE OF MEMBER. The member making the sale did not examine the record, in order to assure himself of the entry of the transaction. *Held*, that this did not conclusively establish contributory negligence on his part, notwithstanding that it was the general practice of members to make such examination daily.

3. ———: ———: LIABILITY OF EXCHANGE. These auction sales were made at a call board, and only members who paid an extra charge for the privilege could participate in them. The clerk and an auctioneer were employed and paid by the exchange, which was a corporation. *Held*, that under the evidence the exchange only undertook to afford such of its members, as wished to avail themselves thereof, facilities for trading among themselves, and did not intend to conduct the auction so as to become responsible for the mistakes of its appointees in charge thereof, and, therefore, that it could not be held for the failure of the clerk to record a sale in the absence of proof of negligence in the appointment of him.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

REVERSED.

Judson & Taussig, for appellant.

The court below erred in refusing appellant's declarations of law and in overruling its motion for a new trial and in arrest, and in its rendition of judgment against this appellant. The admitted facts of the case do not constitute actionable negligence as against defendant Whitmore. Even admitting the actionable negligence of Whitmore, the maxim of *respondeat superior* had no application, in that the merchants exchange upon no theory of law can be held to be the legal superior or principal of the call-board clerk, in recording the private business transactions of plaintiff and his fellow members. The corporate business of the exchange is the furnishing of facilities to its members for the transaction of their individual business.

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State ex rel. v. Merchants Exchange, 9 Mo. App. 96; *Goddard v. Merchants Exchange*, 9 Mo. App. 290; s. c., 78 Mo. 690; *Eliot v. Merchants Exchange*, 14 Mo. App. 234; *Albers v. Merchants Exchange*, 39 Mo. App. 583; s. c., 45 Mo. App. 206. In recording the sale of plaintiff's wheat, Whitmore was transacting the business not of the exchange, but of the plaintiffs and other parties concerned. In transacting their business, he was their agent and not in any conceivable legal sense was the exchange his principal or legal superior in the transaction of such business. Shearman & Redfield on Negligence, sec. 144; Cooley on Torts [2 Ed.] p. 624; Wood on Master & Servant [2 Ed.] sec. 304; 2 Kent's Commentaries [12 Ed.] sec. 260*n;* 2 Dillon on Municipal Corporation [4 Ed.] sec. 974; *Murtaugh v. City of St. Louis*, 44 Mo. 479; *Armstrong v. City of Brunswick*, 79 Mo. 319; *Heller v. Sedalia*, 53 Mo. 159; *McKerner v. City of St. Louis*, 6 Mo. App. 320; *McDonald v. Hospital*, 120 Mass. 432; *Benton v. Trustees*, 140 Mass. 13; *Donovan v. McAlpin*, 85 N. Y. 185; *Patrol v. Boyd*, 120 Penn. 624; *Walsh v. Trustees, etc.*, 96 N. Y. 427; *Lambkin v. Steamship Co.*, 107 N. Y. 228; *O'Brien v. Steamship Co.*, 28 N. E. Rep. 266; *Allen v. Steamship Co.*, 15 L. R. A. 166; *Secord v. Railroad*, 18 Fed. Rep. 221.

C. M. Napton, for respondents.

THOMPSON, J.—The plaintiffs, who are a partnership firm, bring this action jointly against the Merchants Exchange of St. Louis, which is a corporation, and Charles H. Whitmore, an employe of the corporation, to recover damages alleged to have been sustained by the plaintiffs in consequence of a mistake made by Whitmore, while acting as clerk of what is known as the call board of the said exchange. The petition

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alleges that the plaintiffs were members of the exchange and owners of chairs on the said call board, and that at an auction of wheat which took place at said call board they sold to another member of the exchange and of the call board, namely, D. R. Francis & Brother Commission Company, eight cars of wheat for cash; that it became the duty of the exchange, by its agent and servant, Charles H. Whitmore, to make a memorandum and record in writing of said sale; that said Whitmore negligently failed to make such a memorandum in writing; and that in consequence of his negligence the plaintiff could not, under the rules of the exchange, hold the purchasers to the contract of sale, but lost the benefit of such contract. The petition states other facts showing the extent of the damages of the plaintiffs, which are laid at the sum of $126. The answer admits the incorporation of the defendant, the merchants exchange, but denies all the other allegations of the petition. There was a trial in the circuit court before a judge sitting as a jury, and he made a finding and judgment in favor of the defendant Whitmore, but against the defendant corporation, and the corporation prosecutes this appeal. No declarations of law were made, and none were requested, except one by the defendant corporation to the effect that the plaintiff was not entitled to recover against it, which the court refused.

There was little or no conflict in the evidence, and we shall lay out of view two or three questions for the purpose of making clear the grounds on which we shall decide the case. The first of these questions is the contributory negligence of the plaintiffs in not examining the book kept by Whitmore as clerk of the call board for the purpose of ascertaining whether their sale had been correctly entered upon the book. There was evidence tending to show that it was the general

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habit of the members of the exchange to make such examinations seasonably after the close of the auction which took place at the call board, and the evidence showed that the plaintiffs made no such examination in the case under consideration. Contributory negligence was not pleaded; and the rule in this state is that, in actions for damages grounded upon negligence, the contributory negligence of the plaintiff does not, unless pleaded, form a separate issue and is not to be considered unless an unavoidable inference of contributory negligence arises out of the evidence adduced by the plaintiff, either upon the direct or the cross-examination of his own witnesses. *Stone v. Hunt*, 94 Mo. 475. Waiving whatever advantage may accrue to the plaintiffs in respect of this question, growing out of the fact that contributory negligence was not pleaded, we are of opinion that it cannot be said as a matter of law that the plaintiffs were negligent in assuming that the clerk of the call board would put down their sale correctly upon his record.

Another question which we shall lay out of view is the question of the negligence of the clerk of the call board himself. The evidence explains in detail what this call board is. It is merely a meeting of certain members of the exchange, at a certain hour and at a certain place on the floor of the exchange, for the purpose of buying and selling as among themselves at auction, through the aid of an auctioneer and clerk of sales furnished by the exchange. An extra fee is paid by such of the members as acquire membership in this so-called call board, that is, by such of them as acquire the right to buy and sell with each other at this daily auction. The auctioneer and clerk are appointed by the directors of the exchange, and receive compensation from the funds of the exchange, and are under the

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control of the directors of the exchange, and conduct their duties according to certain rules prescribed by the directors, and they are not appointed by or subject to the control of the members of the exchange, or of the call board, in any other sense than that above stated. The evidence shows that the bidding is very rapid at this board, that great confusion attends the sales, and that it is extremely difficult for the clerk to make and preserve an accurate record of them, facts which easily account for the action of the members in verifying the records as soon as entered in the book. It must be conceded, we take it, that even under such circumstances a mistake in inaccurately noting a sale is *some* evidence of negligence,—in other words, that it is what the law books denominate *prima facie* evidence of negligence, such as shifts the burden of proof and calls for an explanation by the party answerable for such negligence. It is plain that the circuit court, as a trier of the facts, might easily have found, in view of the explanation of the difficulties of preserving an accurate record of the sales which take place at this auction, that negligence on the part of the clerk had not been made out. But this would be a conclusion of fact, and not a conclusion of law; and the circuit judge has determined the fact the other way, finding that there was such negligence on the part of the clerk, and his conclusion as trier of the fact is, on well-settled grounds, conclusive upon us.

This leaves it for us to consider whether the corporation known as the Merchants Exchange of St. Louis is answerable for the damages sustained by the plaintiffs in consequence of the negligence of the clerk of the call board, under the rule of *respondeat superior*. We are of opinion that this question must turn upon the view which is taken of the duty which the corporation assumes, and which it is undertood to assume,

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toward its members in respect of the conduct of its call board. The position of counsel for the plaintiffs, as we understand it, is that the members of the exchange who belong to the call board hire and employ the exchange to conduct this auction for them; that the exchange assumes, for a reward paid by such members, the duty of conducting this auction; that it selects its own agents for the discharge of that duty, and makes its own rules for their government in discharging it; and that it is, hence, answerable for their negligence in discharging it, under the rule of *respondeat superior.* On this line of thought a plausible argument has been made by counsel for the plaintiff, and it is plain that the conclusion of the circuit court could be vindicated upon theoretical lines, which would be in accordance with many of the analogies upon which courts have proceeded in dealing with questions of this kind. If the position of the exchange is, as argued by the plaintiff,—if, in other words, it assumes toward the members of its call board, for a special reward paid by each of them, the duty toward each of them distributively of conducting a daily auction for their benefit,—then it seems to be exactly in the position of a common carrier, a telegraph company, or any other corporation or person that undertakes for a reward the performance of a duty and proceeds to perform that duty by its own methods and through its own servants; in such cases the rule of *respondeat superior* undoubtedly applies; the law identifies the master with the servant, and the master becomes answerable for the negligence of the servant.

If, on the other hand, the view pressed upon us in argument by counsel for the exchange be the correct view, that the exchange does not assume for a reward the duty of conducting an auction for the members of its call board, but merely assumes the duty of furnish-

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ing certain facilities upon its floor to enable them to buy and sell with each other at auction,—among these facilities being an auctioneer and a clerk of sales appointed by the exchange through its directors, then it would seem to follow that, unless the exchange has been negligent in establishing these facilities, or more particularly in the present case in the selection of a competent person to act as such clerk of sales, then the rule of *respondeat snperior* does not apply, and it is not answerable for the negligence of such clerk.

As in many other cases where it is sought to make a master liable for the negligence of his servant, or a principal liable for the negligence of his agent, the question of his liability must turn upon a consideration of the nature of the duty which he has undertaken, and which he is understood by the other party to the contract to have undertaken; because, in these as in all other cases, actionable negligence consists in the failure of some duty either assumed by contract or imposed upon the party in a given situation by operation of law. This view may be illustrated by a divergence of judicial opinion which has taken place in this country upon the question, whether a bank which receives a bill or note for collection upon a distant place, and which transmits it to a proper agent at such place for collection, exercising due care in the selection of such agent, is responsible to the owner of the bill or note, if such agent collects the money and fails to pay it over. This divergence of opinion is illustrated by the decision of our supreme court in *Daly v. Bank*, 56 Mo. 94, where, after reviewing several of the opposing decisions, the court held that in such a case the banker receiving the note, and transmitting it to the collecting agent at the distant point with proper instructions, is not liable for his misfeasance in not paying over the money. An examination of the opposing decisions

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upon this question will show that the courts divide in their opinion upon the question what duty the bank receiving the paper for collection assumes and is understood to assume in behalf of the holder of the paper. Some of the courts, and notably the court of appeals of New York (*Ayrault v. Bank*, 47 N. Y. 570), and still later the supreme court of the United States (*Exchange Bank v. Bank*, 112 U. S. 282), hold that such bank assumes the duty by its own agents and its own methods of collecting the paper, and that it is responsible for the negligence or fraudulent failure of its agents to transmit the money collected, exactly as an ordinary bailee, undertaking the performance of duties by his own agents and his own methods, is responsible for their negligence and frauds. The courts, holding the opposing view, proceed upon the ground, that the bank receiving the paper assumes no other duty than the duty of care in selecting a proper collecting agent at the distant point, and of transmitting the paper safely to him with proper instructions. It is plain that there is plausible if not logical ground for the decision of this question either way, and that it is one of those questions which turn on the conception which the judges take of the duty which, in the absence of any express contract, the banker who undertakes to receive and transmit the paper for collection assumes and is understood to assume toward the owner of it.

Such, in our view, is the question before us; and we are clear that it must be made to turn upon the view which we take, upon the evidence presented in this record of the nature of the duty which the incorporated exchange has assumed toward such of its members as have purchased from it the right of buying and selling with each other at this auction, called the call board.

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The exchange was incorporated by the legislature of Missouri in 1863. Prior to that date it had existed as an unincorporated voluntary association. The purposes of its organization, as stated in its articles of association, which existed prior to its incorporation, were to advance and promote the commercial and manufacturing interests of the city of St. Louis; to inculcate just and equitable principles of trade; to establish and maintain uniformity in the commercial usages of the city; to acquire, preserve and disseminate valuable business information; to avoid and adjust, as far as practicable, the controversies and misunderstandings which may arise between individuals engaged in trade, when they have no acknowledged rule to guide them. The corporation has no capital stock in the proper sense of that expression; but it issues certificates of membership for a fee paid therefor, which certificates are transferable, and which have been by this court held to be leviable under execution as property, subject to the rules of the exchange. *Eliot v. Merchants Exchange*, 14 Mo. App. 234. But while it has no capital stock, it has a large surplus, derived from various sources, from the sales of its certificates of membership, from the fees paid by members of its call board, from fines and forfeitures laid against its members, but chiefly it seems from the rent of rooms in its building. It is said to have had, at the time of the institution of this suit, a surplus of nearly $600,000 in cash. Among the offices which it performs is the furnishing of market reports to its members; the furnishing of a building for the transaction of the business of its members among themselves; the keeping of records of its transactions, and the appointment of a board of arbitration and appeals for the settlement of disputes among its members. Like other corporations it has a board of directors. It employs engineers,

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janitors, boys to operate its elevators, and other servants, as well as the auctioneer and clerk of the call board in question. It provides for the use of its members reading rooms and exchange rooms, and establishes rules and regulations for their conduct in the same. It appoints inspectors, establishes grades of grain, etc., establishes rates of commission to be charged by its members, appoints a board of weighers and also a board of registration, and receives deposits put up by members to secure the fulfillment of their contracts with each other. In short, its office consists almost entirely in furnishing a building wherein its members may meet and trade with each other as merchants; in establishing rules for their conduct, when so trading; in furnishing certain facilities for their trading; in prescribing in some respects the forms of their contracts among themselves; and in settling by arbitration their disputes. It thus clearly appears that it is, in all substantial respects, analogous to that class of associations, many of them incorporated and many of them not, known as *mutual benefit societies*. In these societies it is an established principle of law, constantly acted upon by the courts of this state, that the rights of the members *inter sese*, and the rights of individual members against the aggregate society, rest *in contract*, and are to be determined by the reading and comparison of their constating instruments, so-called; of their articles of association, by-laws, rules and regulations, which they have seen fit to make for and among themselves, and to which each member has expressly or impliedly agreed to submit. *Borgraefe v. Knights of Honor*, 22 Mo. App. 142; *Hammerstein v. Parsons*, 38 Mo. App. 337, and authorities cited. This principle applies in cases where such a society is incorporated, as well as to cases where it is unincorporated, with this difference only: That, where it is incorporated, its charter or

the general statute under which it is organized enters into and forms a part of the contract subsisting among the members and between the individual members and the incorporated body, and is, of course, paramount to any other contractual relation which the members may assume among themselves, or as between themselves and the corporation by their private instruments of writing —their articles of association, by-laws, rules and regulations, etc.

In the present case, no statutory provisions to which the corporation known as the Merchants Exchange of St. Louis is subject, and no provisions of its articles of association, its by-laws, rules or regulations, have been cited to us, from which we are able to draw the inference that the exchange assumes the duty, towards such of its members as purchase the privilege of buying and selling on its call board, of conducting an auction for their benefit, in such a sense as makes the exchange answerable for the mistakes of those appointed by it to conduct the auction, assuming that it has been guilty of no negligence in appointing suitable persons to discharge this duty. On the other hand, we agree with counsel for the exchange that all that can be gathered from the instruments which have been put in evidence, relating to the purposes of the exchange and of this call board, is that the exchange undertakes through its directors and other managing officers to afford certain facilities upon its floor to such of its members as wish to avail themselves of such facilities for buying and selling at auction as among themselves. Among these facilities is the auctioneer who calls the offers and bids, and the clerk who records the sales. There is no evidence tending to show that the exchange has been guilty of any negligence in the appointment of these persons to conduct the sales, or in prescribing suitable rules and regulations for con-

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ducting the sales. It is not claimed that Whitmore was not a person entirely suitable and proper to discharge the office of clerk or recorder of the sales. If the members of this incorporated body had intended that the aggregate body should assume such a responsibility towards its members as is sought to be enforced in this action, it would have been easy and natural for them to express that intention in a regulation to that effect. It is easy to see what serious consequences such a regulation might entail. It would make the incorporated body liable for any damages to its own members through any negligent mistakes that might arise in furnishing the facilities which it undertakes to furnish to them,—from a mistake in a telegraphic report of a foreign market, to a mistake of one of its pages in delivering a message. It is quite evident that, if it were held to rest under this liability, it might be necessary for it to increase its assessments against its members, in order to provide the means for meeting such an increased responsibility.

If the question is more nearly viewed in its moral aspects, it seems difficult to answer why the other members of such a body should be held liable to make good the losses of a particular member, sustained through a mistake committed by a servant appointed by the governing body, who is in substance the servant of all the members availing themselves of the facilities in respect of which such servant acts, including the party suffering the loss. In other words the clerk of the call board was in substance and fact the servant of the plaintiff as well as the servant of the corporation; for the plaintiff was himself a member and a part of the corporation.

If we are correct in the view that the duty assumed by the exchange was merely the duty of appointing suitable persons to conduct the auction known as the call board, and prescribing suitable rules for the gov-

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ernment of such auction, then the conclusion that the corporation is not liable becomes very clear; for it cannot be held that, if one person at the request of another appoints an agent to perform some duty for that other, the person so appointing the agent makes himself liable to the principal of the agent for the misprisions of the agent. For instance, a merchant writes to a banker at a distant place to put a dishonored bill into the hands of a suitable attorney for collection. The attorney is guilty of malpractice in the conduct of the suit, whereby the bill is not collected; or he collects it and fails to pay over the money. It would be extraordinary if a lawyer should advance the proposition that the banker selecting the attorney has made himself liable for his negligence or fraud, unless he was negligent in not selecting a reputable and apparently suitable attorney. It would be equally extraordinary if the proposition were advanced, that a person, who calls in a physician or a surgeon to attend upon one who is sick or wounded, makes himself liable to the patient for the malpractice of the physician or surgeon, in the absence of negligence or fraud on his part in not selecting a physician or surgeon of good repute and apparently competent.

Several decisions which have been cited to us by analogy support this conclusion. In *McDonald v. Hospital*, 120 Mass. 432 (s. c., 21 Am. Rep. 529), it was held that an incorporated hospital, having no capital stock nor provision for making dividends or profits, but deriving its funds chiefly from public and private charity, and holding them in trust for the purpose of sustaining a hospital, which has exercised due care in the selection of its surgeon and assistants, is not liable for an injury to a patient though the negligence of its surgeon or the incompetency of a medical student, called a "house-pupil," in not properly setting a broken

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bone. In *Secord v. Railroad*, 18 Fed. Rep. 221, it was held that a railroad company, which provides surgical assistance to an injured passenger, is not, in the absence of negligence in selecting the surgeon, liable to the passenger for damage sustained through his malpractice. In *Laubheim v. Steamship Co.*, 107 N. Y. 228, it was held that a steamship company, which exercises reasonable care in selecting a surgeon to attend to its passengers on its voyage, is not liable in damages to a passenger for an injury received through the malpractice of such a surgeon. In *O'Brien v. Steamship Co.*, 28 N. E. Rep. 266, the supreme judicial court of Massachusetts made a similar ruling. To the same effect is *Allen v. Steamship Co.*, 132 N. Y. 91; s. c., 15 L. R. A. 166. In *Murtaugh v. St. Louis*, 44 Mo. 479, it was held that the city of St. Louis was not liable in damages to a non-paying patient at the hospital of the city for injuries resulting from the negligence and misconduct of the hospital officials and servants.

In these cases the plaintiff, seeking to charge the corporation with liability on the principle of *respondeat superior*, was not a member of it, as in the case before us. A principle, which would make the exchange liable in such a case as that before us, would, by extension upon strictly logical lines, lead to some startling results. For instance, many of the benefit orders, incorporated and unincorporated, employ physicians at a salary to attend upon their members during sickness. A principle, that would charge the merchants exchange in favor of a member of its call board with damages for the mistake of the clerk of the call board, would charge one of these mutual benefit societies in favor of one of its members for damages for the malpractice of one of its physicians, although it may have been guilty of no negligence in the selection

of the physician. Social clubs occupy a position in law analogous to merchants exchanges. A principle, that would charge the merchants exchange under the facts of this case, would charge an incorporated club, in favor of one of its members, with damages, in case the member should be made sick or poisoned by a mistake of its caterer in making a can of ice-cream, or in other ways that might be supposed.

On the whole, while the question is by no means free from difficulty, we feel constrained to take a different view of it from that taken by the circuit court, and we accordingly reverse the judgment with the concurrence of all the judges.

LAURA B. HASTINGS, Respondent, v. JOHN B. HENNESSEY, Appellant.

St. Louis Court of Appeals, December 27, 1892.

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Forcible Entry and Detainer: APPEAL. An appeal from the judgment of a justice of the peace in an action of unlawful detainer must be taken and perfected in the manner prescribed by special statutory provisions in regard thereto; the statutes in relation to appeals from justices in ordinary proceedings have no application. Accordingly, when such an appeal is taken from a judgment rendered during the term of the circuit court to which it is returnable, it is essential to its validity that it should be perfected by the filing of the requisite affidavit and recognizance with the justice within six days after the rendition of the judgment.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

Harvey & Hill and *H. K. Bunch*, for appellant.

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M. Hilton, for respondent.

THOMPSON, J.—This was an action of unlawful detainer, commenced before Justice Mielert, of the city of St. Louis, and transferred for trial to Justice Zimmermann, of the same city, by whom it was tried, resulting in a judgment for the plaintiff. This judgment was rendered on June 19, 1891. On June 20, 1891, the defendant Hennessey again appeared before the justice and filed an affidavit for an appeal in due form. On June 24, 1891, he tendered an ordinary appeal bond, hereafter more fully described, with one surety in the amount fixed by the justice. The justice received this bond and indorsed on the same: "Attest and approved, this twenty-fourth day of June, 1891. T. F. W. Zimmermann, justice of the peace of the second district, city of St. Louis, Missouri." Thereupon Hennessey and his surety went away. Subsequently the justice seems to have become satisfied that the bond was defective, and that the surety was insufficient. Thereupon, on the twenty-seventh of June, he wrote a letter to Hennessey as follows:

"The bond [describing it] entered into by yourself as principal and Peter A. Ruga as surety was, on the twenty-fourth day of June, by me approved on condition that the bond would be sufficient. This I find not to be the case to my satisfaction. After consulting the statutes, I find I erred in drawing the bond. *Secondly*, the bond is insufficient, unless Mr. Ruga proved that there is only due on incumbrances the sum of $8,000, whereas the records show $11,000. Hence, you will, before appeal time expires, furnish a bond which will comply with the statutes and be sufficient in all particulars. Please attend to this before July 4, 1891.

"Respectfully,

"T. F. W. ZIMMERMANN,

"Justice."

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Thereafter on the thirtieth of June the justice approved an appeal bond with the same surety. This, it will be remembered, was more than ten days after the trial. The justice filed the transcript and papers in the circuit court on the sixth day of July. On July 7, the day after the papers were thus filed, the plaintiff appeared by her attorney, and filed a motion to dismiss the appeal, on the following grounds: "*First.* Because the judgment of the justice was rendered June 19, 1891, during the session of the circuit court of St. Louis, yet the bond was not executed or filed with the justice until June 30, 1891. *Second.* Because the transcript of the record and proceedings and original papers in this case were not filed with the clerk of this court, until July 6, 1891, yet the judgment of the justice was rendered June 19, 1891, and the record so shows—at which date the circuit court of St. Louis was in session. *Third.* Because this court was without jurisdiction, and the record so shows."

Now the transcript returned by Justice Zimmermann to the circuit court did not show that an appeal bond had been tendered and approved on the twenty-fourth of June, as already stated; nor that such a bond had been tendered and approved by him conditionally; nor that an informal and insufficient bond had been tendered by the defendant Hennessey and received by him, and that he had thereafter required Hennessey to furnish a sufficient bond, and that Hennessey had thereupon furnished the bond which was approved on June 30; nor did it show anything of the kind. It merely recited: "June 20, 1891, comes defendant Hennessey and files his affidavit for appeal; and on June 30, 1891, comes said defendant and files his appeal bond in the sum of $800, with Peter A. Ruga as surety. Bond approved and appeal allowed."

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Such being the transcript returned by the justice, and the motion to dismiss the appeal having been made, as already recited, the defendant, on July 13, 1891, filed in the circuit court a petition for a rule on the justice requiring him to amend his return in accordance with the facts. This rule was supported by affidavits tending to show the above state of facts, and also tending to show that defendant had used due diligence in endeavoring to get the justice's transcript and the papers, and file them in the circuit court within the time prescribed by the statute. In compliance with the prayer of this petition, the circuit court, on the ninth of November, 1891, made a rule *nisi* on the justice to file in the circuit court, within ten days from that date, the appeal bond presented to him on June 24, 1891, and to correct his transcript so as to show what action he took at the time with reference to approving or disapproving said bond. On the thirteenth of November the justice made a long return to this rule, in which he stated, in substance, that he took and approved said bond on the condition, intimated at the time to defendant, that the security was as represented to him at the time of taking the bond; that, being satisfied from subsequent inquiry that the security was insufficient, and for the further reason that the bond was not in the form required by the statute, he disapproved it, and on the next day indorsed it as disapproved. His return then recites at considerable length his notice to the defendant of his action, and the giving of the new bond on the thirtieth of June. He filed the bond of June 24 as an exhibit to his return. He claimed in his return to have acted in good faith, and stated that he did not embody in his transcript the facts set up in his return, because he did not regard it of sufficient importance to do so. The bond is not the statutory bond required by section

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5144, of the Revised Statutes, to be given by the *defendant* in actions of unlawful detainer, but is similar to the bond required by the *complainant* in such actions by section 5143, which is the same as the appeal bond in ordinary appeals from justices of the peace. In other words, it contained no clause binding the appellant not to commit waste or damage, and to pay all rents, profits or damages that should be adjudged against him. It was clearly insufficient under the statute, and would not have operated to perfect the appeal. It contained the indorsement already recited, showing its approval by the justice on the twenty-fourth of June, 1891. But immediately thereafter it also contained the following indorsement:

"Bond disapproved, June 25, '91, on account of error in drawing the bond, and on account of the insufficiency of the bond.

"T. F. W. ZIMMERMANN,
"Justice."

With this return before the court, the plaintiff, on December 31, 1891, filed another motion to dismiss the appeal for the following reasons: "*First.* Because no notice of this appeal has been given by the appellee, yet the appeal was not allowed on the same day on which the judgment was rendered by the justice, and the present is the second term of this court after or since said appeal was taken. *Second.* Because this court has no jurisdiction over the subject-matter of this action, or in the premises." Thereafter the court sustained this motion and dismissed the appeal, and defendant appeals to this court, assigning for error the action of the court in so doing.

The jurisdiction of a justice in forcible entry and detainer cases is special, and is prescribed to its minutest details by the forcible entry act. The mode of taking and perfecting an appeal prescribed by the

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justice act has nothing whatever to do with the appeal in this case. *Carter v. Tindall*, 28 Mo. App. 316. The statute governing such appeals (Revised Statutes, sec. 5137) prohibits the allowance of such an appeal in any case, "unless the same be applied for and an affidavit and *recognizance filed* (with the justice) within ten days after the rendition of the judgment, and before the return day of the appeal, although such return day be within ten days after the rendition of the judgment." The judgment of the justice was rendered on the nineteenth of June. The June term of the circuit court was then in session. That is shown by this record, which contains orders of a later date made at the June term. The appeal was, therefore, returnable within *six days* after the rendition of the judgment. Revised Statutes, sec. 5138. It was, therefore, absolutely necessary, in order to perfect his appeal, that the defendant should have given such a recognizance as the statute requires within six days after the rendition of the judgment. He did not give such a recognizance until the eleventh day after the rendition of the judgment. There was, therefore, no appeal, and the circuit court acquired no jurisdiction, and, hence, rightly sustained the motion to dismiss the attempted appeal.

The judgment will be affirmed. All the judges concur.

H. P. Hart, Respondent, v. J. J. Hopson, Appellant.

St. Louis Court of Appeals, December 27, 1892.

1. **Evidence:** COMPETENCY OF DECLARATIONS OF A CO-CONSPIRATOR. In order to render the declarations of a stranger to the action competent evidence, on the ground that he was a co-conspirator of the party

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against whom they are offered, there must first be some proof of the existence of the conspiracy. Such proof may be circumstantial, but it must do more than raise a bare suspicion of a possible conspiracy.

2. **Instructions:** RIGHT OF JURY TO DISCREDIT WITNESSES. An instruction to the jury declared that, if they believed any witness had willfuly sworn falsely as to any of the facts mentioned in the other instructions as bearing upon the claim sued on or the defenses thereto, they were at liberty to entirely disregard the testimony of such witness. *Held*, that the instruction authorized the jury to discredit only witnesses who had wilfully sworn falsely to material facts, and was proper.

3. **Principal and Agent:** RIGHT OF LATTER TO COMPENSATION. The defendant in this cause employed the plaintiff to procure from a third party a contract for the sale of the latter's leasehold interest in certain realty, and agreed to pay the plaintiff a fixed compensation as soon as the contract was obtained. The plaintiff procured the contract, but the sale was not consummated because the leasehold title contracted for was valueless, it being incumbered for its full value. *Held*, that the plaintiff having acted in ignorance of this defect in the title, and having performed the services agreed upon, he was entitled to the stipulated compensation.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

J. W. Collins, for appellant.

The court erred in refusing to admit to the jury legal and competent evidence offered by defendant regarding the statements and acts of Daniel Prince, concerning the property described in the statement. The acts done and statements made by Daniel Prince to defendant during the time of negotiating the agreement in question were, under all the facts and circumstances in evidence, admissible for the purpose of showing or tending to show fraud on the part of the plaintiff in his dealings with defendant concerning the agreement and property in controversy. Fraud or conspiracy need not be proven by direct or positive evidence, but

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they may be shown and inferred from facts and circumstances. *Herboth v. Gaal*, 47 Mo. App. 255; *State v. Walker*, 98 Mo. 95; *Redding v. Wright*, 51 N. W. Rep. 1056; *Ochs v. People*, 124 Ill. 399; *Burgert v. Borchert*, 59 Mo. 80; *Massey v. Young*, 73 Mo. 273; *Frederick v. Allgaier*, 88 Mo. 598; *Hopkins v. Sievert*, 58 Mo. 201. (2) The court should have given the instructions asked by defendant at the close of plaintiff's case, and of the entire case, stating that plaintiff could not recover under the evidence, no agreement having been shown by the evidence to have been brought about by plaintiff between defendant and Philip Braun, as is alleged in plaintiff's cause of action. If plaintiff is entitled to recover at all, it is upon a *quantum meruit* for services, and not upon the express agreement. *Blackwell v. Adams*, 28 Mo. App. 61. (3) One of the instructions given by the court of its own motion, as well as one given on behalf of plaintiff, is erroneous, and calculated to mislead and confuse the jury. They are not based on the pleadings or issues in the case. The plaintiff's suit is for services rendered by him in bringing about and consummating a complete and entire agreement between defendant and Philip Braun for the purchase of property. By said instructions plaintiff's right to recover for the whole services, alleged by him to have been rendered, is permitted and directed upon proof being adduced of his doing a portion of the [services, and which constitute only one element or part of the services entering into consummating the whole combined agreement. These instructions were also against the evidence. *Fairgrieve v. Moberly*, 29 Mo. App. 141; *George v. Railroad*, 40 Mo. App. 447; *Parker v. Marquis*, 64 Mo. 38; *Mound City Co. v. Conlon*, 92 Mo. 221; *Merrett v. Poulter*, 96 Mo. 237; *Johnson v. Railroad*, 96 Mo. 340. (4) The court erred in giving the instruction for plaintiff, declaring

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that there was no evidence of any fraud, collusion or conspiracy on the part of plaintiff with other persons, and that such defense was not made out. The court could not take this issue from the jury if there was any evidence from which fraud or conspiracy could have been inferred. *Pipe Co. v. Ins. Co.*, 52 N. W. Rep. 1070; *St. Vrain v. Boat Co.*, 56 Mo. 590; *Cook v. Railroad*, 63 Mo. 402; *Kelly v. Railroad*, 70 Mo. 608. The court erred in the instruction given by it as to the credibility of the witnesses. The jury were directed by it that, if any witness had wilfully sworn falsely to any of the facts mentioned in the instructions, they were at liberty to disregard his entire evidence. The instruction should have been confined to the false swearing to material facts in evidence, and the jury should not have been allowed to disregard a witness' testimony, where the jury believed he had sworn falsely to an irrelevant, immaterial or trivial matter. The jury should not have been restricted and limited to only the facts mentioned in the instructions in determining whether a witness had sworn falsely, but they should have been allowed in determining this fact to take into consideration all of the material facts and circumstances in evidence. *Blitt v. Heinrich*, 33 Mo. App. 243, 246; *Evans v. Railroad*, 16 Mo. App. 525; *Bank v. Murdoch*, 62 Mo. 73; *Railroad v. Ives*, 12 Sup. Ct. Rep. 679; *Fraser v. Haggerty*, 49 N. W. Rep. 616; *Carter v. Carter*, 28 N. E. Rep. 948; *Thompson v. Douglas*, 13 S. E. Rep. 1015.

C. B. Allen and *E. L. King*, for respondent.

There was no error in refusing to admit in evidence the statements of Prince. Prince was not a party to the suit, and the statements called for were not made in presence of plaintiff. *Fougue v. Burgess*, 71 Mo. 389.

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The declaration of an alleged conspirator is not admissible against such party until the conspiracy is established. *Strohmeyer v. Zeppenfield*, 28 Mo. App. 273; *Holliday v. Jackson*, 30 Mo. App. 263. There must be substantial evidence of a conspiracy *aliunde*, independent of the declaration of a co-conspirator, before these declarations are admissible. *Strohmeyer v. Zeppenfield*, 28 Mo. App. 273; *Hambright v. Brockman*, 59 Mo. 52. There was no conspiracy shown and the statements were incompetent. *State v. Walker*, 98 Mo. 104. Where, on a charge of fraud, the evidence is as consistent with honesty as dishonesty, it will be construed in favor of honesty. *Webb v. Darby*, 94 Mo. 621; *Ames v. Gilmore*, 59 Mo. 537; *Page v. Dixon*, 59 Mo. 43; *Henderson v. Henderson*, 55 Mo. 534; *Rumbold v. Parr*, 51 Mo. 592; *Dallam v. Renshaw*, 26 Mo. 544.

Thompson, J.—This action was originally commenced before a justice of the peace upon the following statement of account: "1891. J. J. Hopson to H. P. Hart. To money due for services rendered, time and attention given, in making an examination and giving opinion as an expert, and in bringing about an agreement between him and Philip Braun, concerning the purchase of certain property on the northeast corner of Franklin avenue and Seventeenth streets, in the city of St. Louis, Missouri, $200." A trial before a jury in the circuit court resulted in a verdict and judgment in favor of the plaintiff for the sum claimed, with interest; from which the defendant prosecutes this appeal.

There was no defensive pleading, nor did counsel for the defendant make any oral statement of his defense; but in his statement filed in this court his defenses, which we shall assume to be the defenses which he attempted to develop in his evidence and by

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the cross-examination of the plaintiff's witnesses, are thus stated:

"*First.* That plaintiff [Hart] did not perform any of the alleged services set forth in the statement for defendant, and that whatever plaintiff did in the matter, he did for the Hopson Dairy Company, and Philip Braun, in whose names the agreement referred to in the cause of action was made; that defendant was treasurer of said company at and before the time said agreement was made, and acted as its agent in his dealings with Hart in reference to said agreement, as well as in all matters set out in his cause of action.

"*Second.* That misrepresentation and concealment of facts and fraud were practiced by the plaintiff Hart in bringing about an agreement for the purchase of the property described in the cause of action, and in reference to the services sued for, by means of which representation and fraud $200 was paid on the purchase price and agreement of purchase of said property to Philip Braun, when, in fact, the interest of said Braun in said property was worthless and of no value; that said property was incumbered for $6,000, when plaintiff represented to defendant that it was incumbered for $3,000; and plaintiff represented to defendant that the title to said property could be gotten and possession of the same could be obtained at any time, when, in fact, possession of said property could not be delivered by said Braun at all, or a good title given by him, he not being in possession of said property himself, having by a five years' lease and other conveyances and acts parted with the possession of said property and all control over the same, so that he even did not have the right to control or rent said property, or to collect or receive the rent coming therefrom.

"*Third.* That the plaintiff Hart, and one Daniel Prince, and said Philip Braun, the party named in

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plaintiff's cause of action, or said Hart and Prince, did conspire and collude together for the purpose of perpetrating a fraud in the sale of the property described in the statement, and in bringing about the agreement for the purchase of the interest of said Braun in said property; that, by reason of said conspiracy, said agreement was brought about, and $200 paid on the same to said Braun upon the purchase price of said property for his leasehold interest therein, which was of no value and worthless, it being incumbered for about $6,000, when said Hart and Braun told defendant it was incumbered for $3,000, and said Braun could not give a title to or deliver possession of said property, as he and said Hart had represented to defendant that Braun could do, said Braun not being in possession of said property himself, nor had he either the right to possession or the right to control or rent the same, or to collect or receive the rent therefor."

The plaintiff gave evidence at the trial tending to show the rendition of the services by him at the request of the defendant, as alleged in his statement, resulting in bringing about a contract between the Hopson Dairy Company, of which the defendant was the treasurer and one of the managers, and one Braun, the owner of a leasehold upon the property mentioned in the plaintiff's statement, for the sale of the leasehold by Braun to the dairy company. The agreement was in writing, and was as follows:

"St. Louis, Mo., September 21, 1891.

"Received of Hopson Dairy Company $200, in part payment of a certain leasehold of improved property, being situated on the northeast corner of Seventeenth street and Franklin avenue, city of St. Louis, and state of Missouri, which leasehold is this day sold to them for the total sum of $4,800, payable on terms of $1,000 in cash and the remainder of $800 ninety

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days after date, with interest at six per cent. per annum, payable also in ninety days after date. Said deferred payment to be secured by a deed of trust, and assume a deed of trust of $3,000 already on said property. It is agreed by and between the undersigned that the title to said property is perfect, and will be conveyed free from liens and incumbrances, except as to taxes to date. The said Hopson Dairy Company is to have twenty days' time in which to have the title investigated. The said Hopson Dairy Company is given until the first day of November, 1891, to make the first payment on said leasehold, and, when the first payment is made, the said Hopson Dairy Company shall take possession of said leasehold. Now, if said Hopson Dairy Company fails to make the first payment on or before November 1, 1891, the sale shall be off and the money forfeited. If, upon examination, the title proves to be defective and cannot be made good within a reasonable time, the sale shall be off and the earnest money returned. And Mr. Philip Braun agrees to have the corner of Franklin avenue and Seventeenth street vacated in ninety days from time the said Hopson Dairy Company takes possession. We agree to above.

"(Signed) PH. BRAUN, [Seal]
"HOPSON DAIRY CO., [Seal]
"By J. J. HOPSON, Tres. [Seal]"

I. The first error assigned is the refusal of the trial court to admit in evidence the statements of a mulatto man named Prince, supposed to have been made to the defendant. The effort was to elicit evidence of the statements on the examination of the defendant by his own counsel. It appeared that, after the defendant employed the plaintiff to see if he could procure a purchase of the particular property, the plaintiff met Prince casually and asked him if he knew

the owner of the leasehold, and Prince said that he did; whereupon the plaintiff sent Prince out to Braun, to see if Braun wanted to sell. Braun said that he did, and agreed to give Prince a commission for bringing about a sale. Prince reported back to the plaintiff that he had made an agreement with Braun, and that, if he (Prince) succeeded in selling it, Braun was to pay him a commission. Braun's version of this seems to be a little different. It is to the effect that, after Prince learned that the bargain had been closed, he came to Braun and wanted him to pay him a commission for introducing the plaintiff Hart to Braun, which Prince had done; and that Braun finally agreed to give Prince $100 for his services as soon as the trade should be consummated, and he get his money. Whichever of these versions is to be taken as correct, it is perceived that Prince, by reason of having been sent by the plaintiff to Braun to make these inquiries, acquired a direct motive for bringing about the trade in the hope of getting a commission from Braun. Acting, no doubt, under this motive, he made several visits to the defendant. The defendant testified that Prince was around his place of business several times; that Hart, the plaintiff, spoke of Prince in connection with the matter several times; that, on one occasion, after Hart had left, Prince came in, "to see us about this matter." Then followed the questions which the court ruled out: "What did Prince say, when he came in? (Counsel for plaintiff objects as immaterial. The court ruled that the defendant must produce evidence tending to show a conspiracy before the declarations of a supposed conspirator are admissible; to which ruling of the court the defendant then and there duly excepted.)

"*Q*. Did you receive a letter from Mr. Prince about the price that was to be paid for this Seventeenth

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and Franklin avenue property? Did he show you a letter? *A.* He showed me a letter.

"*Q.* When was it? *A.* Just about the time or a little before we paid the earnest money on the property.

"*Q.* What was the purport of that letter? *A.* Well, I did not read the letter; he just said that the letter was from his boss to Mr. Braun, making an offer on the property of $6,000, and, if we wanted to buy the property for $4,800—(Counsel for plaintiff objects, as it was the same matter as that ruled against in the last question.)

"The court: I think the objection is well taken. The statements of Mr. Prince are not admissible, until you show that Mr. Prince is in some way connected with Mr. Hart, or that a conspiracy actually existed to make the declarations admissible as the declarations of a conspirator. (Defendant then and there duly excepted to the ruling of the court.)

"*Q.* State what Prince said in regard to putting up this $200. (Counsel for plaintiff objects. The court sustains the objection, to which ruling the defendant then and there duly excepted.)

"The court: I do not mean to say that this evidence may not be admissible; but, until you lay a foundation for those declarations, they are not. (To which ruling of the court defendant duly excepted at the time.)"

There were further similar questions and similar rulings. These rulings were correct. No substantial evidence had been given tending to show, what is now claimed in support of this assignment of error, that a conspiracy had been concocted between the plaintiff and Prince to get the defendant, or the dairy company of which he was treasurer, to purchase a worthless leasehold belonging to Braun. It is argued in

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support of this assignment that a conspiracy need not be shown by direct and positive evidence, but may be shown by circumstantial evidence. This is true, and it is also true that in many cases conspiracies can be shown in no other way than by circumstantial evidence. But, nevertheless, there must be circumstances reasonably pointing to the conclusion of a conspiracy; and, in order to justify a court in letting in the declaration of a supposed co-conspirator, such circumstances must be more than enough to raise a bare suspicion of a possible conspiracy. These declarations, if in fact made by Prince, were easily explainable on the motive that Prince evidently had in bringing about a sale of the property in the hope of getting a commission from Braun; and we see no substantial evidence of a conspiracy between Prince and the plaintiff to cheat the defendant.

II. The next assignment of error is that the court should have given the instructions asked by defendant at the close of the plaintiff's case, renewed at the close of the entire case, to the effect that the plaintiff was not entitled to recover under the evidence. The argument adduced in support of this assignment is that no evidence had been adduced showing that an agreement, *had been brought about* by the plaintiff between the defendant and Philip Braun, as alleged in the plaintiff's cause of action; so that (such is the argument) if the plaintiff is entitled to recover at all, it is upon a *quantum meruit* for services, and not upon the express agreement. The plaintiff's evidence tended to show that the defendant Hopson employed him to bring about the purchase of this property, and agreed to give him $200 as his compensation if he succeeded. He also instructed the plaintiff to proceed as though desiring to purchase it in his own name, the defendant

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having some reason for concealing from Braun the real purchaser until the trade had been consummated. The evidence also tended to show that the plaintiff, having ascertained through Prince that Braun was willing to sell, negotiated with Braun, so that Braun finally agreed to take $4,800 for his leasehold. The defendant had promised the plaintiff that, if he could get Braun to sell his interest for that amount, he, the defendant, would give the plaintiff $200 for his trouble and services. The plaintiff testifies that he knew nothing whatever about the dairy company in the matter; that there was no sign over the door of the place where the defendant did business indicating that it was the office of a dairy company, and that he knew nothing about the dairy company being the real party in interest until the trial before the justice of the peace. The plaintiff had such negotiations with Braun that Braun finally agreed to sell his interest for $4,800, and then plaintiff introduced the defendant to Braun as the real purchaser. Defendant and Braun then went to a notary where the contract was drawn up, in which the dairy company is named as the purchaser, which contract has already been set out. This statement of facts makes it appear that this assignment of error is untenable; that the plaintiff did bring about the contract, and that if the contract was not finally consummated by reason of the inability of Braun to clear off the title, and procure an assignment of his leasehold to the dairy company, that was something with which the plaintiff had nothing to do. He effected the trade, and brought the parties together and the written agreement above set out was made in pursuance of the negotions which he had had with Braun, and $200 of earnest money were paid by the dairy company to Braun; and all this, according to the plaintiff's evidence, was done by the plaintiff at the request of the

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defendant, and upon a promise to pay the plaintiff $200 for such services, the plaintiff not knowing that the dairy company was the real party in interest until after the suit was commenced. This seems to make it very clear that the court committed no error in submitting the case to the jury.

III. The next assignment of error complains of the following two instructions; the first given at the request of the plaintiff, and the second given by the court of its own motion: "The court instructs the jury that, if they believe from the evidence that the defendant agreed with plaintiff to give him $200 if plaintiff would examine certain buildings and make a report thereon to defendant, and would procure Braun's consent to the transfer of the leasehold interest mentioned in the evidence for a consideration of $4,800, and that plaintiff did so examine, and did so make a report to defendant, and did so procure Braun's consent, and that Braun and Hopson entered into an agreement for such transfer, your verdict should be for the plaintiff, although you may further find that no transfer of the lease was made, unless you believe from the evidence that, in making such contract, the defendant Hopson acted for and in behalf of the Hopson Dairy Company, and that plaintiff knew such to be the fact."

"Unless you believe from the evidence that the defendant agreed with plaintiff to give him $200, if plaintiff would examine certain buildings on the property mentioned by witnesses, as the subject of negotiations between the plaintiff and defendant, and make a report thereon to defendant, and would procure Braun's consent to the transfer of the leasehold interest mentioned in the evidence for a consideration of $4,800, and that, in pursuance of such agreement, the plaintiff did so examine said buildings, and did so make a report to defendant, and did so procure Braun's consent, and

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that Braun and Hopson entered into an agreement for such transfer, you should find for the defendant."

The argument in support of this assignment of error is, that these instructions are not based on the pleadings or issues in the case; that they proceed in disregard of the pleadings, and place the plaintiff's right to recover on the evidence alone, and direct the jury that, if the plaintiff procured Braun's consent to the transfer of the leasehold, and if Braun and Hopson entered into the agreement, the plaintiff should recover. We find ourselves unable to gather the force of the objections to these instructions. It is argued that the plaintiff's suit is for services rendered by him in bringing about, and consummating, a complete and entire agreement between defendant and Braun for the purchase of the property. Recurring to the plaintiff's statement of his cause of action, we find that it is drawn without much particularity of statement, as is admissible in statements in actions before justices of the peace. It is simply an account "for money due for services rendered, time and attention given, in making an examination and giving opinion as an expert, and in bringing about an agreement between him [defendant] and Philip Braun, concerning the purchase of certain property," describing it. It appeared in the evidence that "the property" of Braun consisted of a leasehold upon the described property, and that this leasehold was the subject of the negotiations and of the contract which has been already quoted. These instructions were, therefore, carefully applicable to the evidence under the plaintiff's statement, and there seems to be no tenable ground for concluding that they are open to the vice of singling out certain facts, not in themselves controlling, and directing a verdict regardless of other facts at issue. These instructions do not, as is argued, restrict the issue, but proceed upon the evidence

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within the case stated in the plaintiff's statement. If the evidence produced by the party sustaining the burden of proof does not make a case as large as his allegations make it, the court is not to instruct the jury according to his allegations, but is to instruct them according to his evidence.

IV. The next assignment of error is predicated upon the giving by the court, at the request of the plaintiff, of the following instruction: "The court instructs the jury that there is no evidence before them of any fraud, collusion or conspiracy on the part of the plaintiff with other persons, and that defense, therefore, is not made out." This instruction was manifestly drawn with the idea of meeting that part of the defense, which endeavored to exonerate the defendant from keeping his agreement with the plaintiff, on the ground that the plaintiff had conspired with the colored man, Prince, to misrepresent the condition of the title of the property to the defendant, and to impose upon him (or upon the dairy company) a worthless leasehold of a party, who did not have possession himself and who did not have the power of putting the purchaser in possession. It would serve no useful purpose to attempt to go into an analysis of the evidence for the purpose of disposing of this assignment of error. It is sufficient for us to say that we have carefully examined the evidence, and that we agree with the circuit judge that there was no evidence of such a fraud, collusion or conspiracy, between the plaintiff and any other person as that described in the instruction.

V. The next assignment of error is predicated upon the giving by the court of its own motion of the following cautionary instruction: "You are instructed that the jury are the sole judges of the credibility of the several witnesses that have appeared before you, and of the weight or importance to be given

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to their respective statements of testimony; and, if you believe from all that you have seen and heard at the trial that any witness has wilfully sworn falsely as to any of the facts mentioned in the instructions herein, as bearing on the plaintiff's alleged claim or defendant's defenses thereto, then you are at liberty to disregard entirely the testimony of such witnesses."

We are quite unable to gather the force of the objection to this instruction. It is said that it should have been confined to false swearing to material facts in evidence. It is true that the usual frame of language, in which such instructions are given in this state, directs the jury that, if they believe that any witness has wilfully sworn falsely to any material fact in issue, they are at liberty to disregard his testimony entirely. But this customary frame of language leaves the jury without any specific direction by which to decide what are material facts in issue; whereas the instruction, as drawn by the court in this case, directs them to the hypothetical facts stated in the instructions. In this regard the instruction seems to be more carefully drawn, and hence better, than the instruction which is usually given under this head. This instruction was given by the court of its own motion, in modification of a similar instruction tendered by the plaintiff. It is said to have been intended by the counsel for the plaintiff to direct the attention of the jury to the evidence of the defendant himself, which to some extent had been indirectly impeached by evidence that, at the trial before the justice of the peace, he had admitted the plaintiff's claim and had stood solely upon the defense, that the contract was not his personal contract but was the contract of the dairy company of which he was treasurer. On the whole, we see no error in giving this instruction, and we overrule this assignment of error.

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We see no other error in the other instructions. The errors assigned seem to be all of them untenable. Plaintiff's case was that he was employed by the defendant as the latter's agent to procure the sale to the defendant of the leasehold interest of Braun in the property described in the plaintiff's statement. As the defendant's agent, he was not employed to make representations to the defendant as to the title—he had nothing to do with that; he was not a guarantor of that; he simply, obeying the instructions of the defendant and concealing the identity of the defendant as the purchaser, procured Braun to make the agreement to transfer his leasehold interest in the premises for $4,800; and, this having been done, he introduced the defendant to Braun, as the person with whom the contract was to be closed. Thereupon, Braun and defendant closed it in the name, not of the defendant, but of the dairy company. If the title did not prove as good as the defendant expected that it would be, it is difficult to see how he can throw the responsibility of that upon his agent, and make that a ground of not paying the compensation which he agreed to pay his agent for his services in the premises. If, on the other hand, the plaintiff, having been so appointed by the defendant his agent in the premises, in violation of his trust and duty, manœuvered to entrap his principal into making the purchase, knowing that it would turn out to be a worthless purchase and one that could not be consummated, it must be conceded that this would be a good defense to the action. But it seems to us that there is no evidence tending substantially to make out such a defense as against this plaintiff. What the colored man, Prince, may have said or done in that regard, is something for which the plaintiff is not answerable in the absence of evidence that he authorized it, or that

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it was done in pursuance of a conspiracy concocted between him and Prince.

Our conclusion is that the judgment of the circuit court must be affirmed. It is so ordered. All the judges concur.

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GEORGE F. KIMBALL, Respondent, v. ALEXANDER DAVIS, Appellant.

St. Louis Court of Appeals, December 27, 1892.

1. **Corporations: SHAREHOLDERS. A certificate of stock is only one of the evidences of the title of the shareholder, and the issue of one is not necessary for the purpose of charging him with the liability of a shareholder in favor of a creditor.**

2. ———: CONSTRUCTION OF FOREIGN STATUTE: EFFECT OF INTERPRETATION GIVEN IN FOREIGN JURISDICTION. In the construction of a foreign statute the interpretation placed upon the statute by the highest court of the foreign jurisdiction is conclusive.

3. ———: ———. A statute of Iowa provided that the failure to comply substantially with another statutory requirement for the publication of a certain notice should render the individual property of the stockholders liable for corporate debts. *Held*, that the word stockholders, as used in this statute, included corporators or members having a direct financial interest in the business of the corporation with a power to participate in the profits and in the conduct of its affairs.

4. ———: ———. *Held* also that, under this statute, the publication of such notice was a condition precedent, not necessarily to the existence of the corporation as an artificial body, but to clothing its members with the immunity of corporators from liability for corporate debts.

5. **Foreign Corporators:** LIABILITY OF SHAREHOLDERS: ENFORCEMENT OF FOREIGN STATUTE. Penal statutes are local and are not enforced on any principle of comity outside of the jurisdiction enacting them. But *held*, that the aforesaid statute of Iowa was not penal, since it did not take away anything already granted, but merely prescribed a condition precedent to the acquirement by shareholders of immunity from liability for corporate debts.

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6. ———: ———: ———. *Held,* in the course of discussion, and without regard to the question of the validity of an incorporation obtained by citizens of one state under the laws of another with the intention of carrying on business in their own state, that such incorporators cannot, under the guise of being exempt from foreign penal statutes, import into their own state by means of such incorporation any greater immunities or franchises than they possess in the state of their incorporation.

7. ———: FOREIGN STATUTORY PROVISIONS FOR PUBLICATION OF NOTICE: SUFFICIENCY OF NOTICE. *Held* that a certain notice published in pursuance of the aforesaid statute of Iowa did not comply with the requirements of the statutes of that state, in that it did not state truly either the amount of the capital stock authorized, or the times and conditions on which it was to be paid in; also that a second notice was defective in the latter respect.

Appeal from the St. Louis City Circuit Court.—HON DANIEL D. FISHER, Judge.

AFFIRMED.

Hiram J. Grover and *J. L. Bruce*, for appellant.

(1) Davis could be made a stockholder only by contract or estoppel. *Burgess v. Seligman*, 107 U. S. 20; also 92 Mo. 635. (2) He was not a stockholder by contract, never having subscribed for, agreed to pay for or owned any shares, except one which he purchased to qualify him as a director to protect his interest as a creditor. *Burgess v. Seligman*, *supra*. (3) The law of Iowa permits a corporation to come into existence without having its stock subscribed for. *Johnson v. Kesler*, 76 Iowa, 411. (4) Davis' acting as incorporator and director did not estop him from denying that he was a shareholder; inasmuch as neither at common law nor under the Iowa statutes are incorporators or directors required to be stockholders. Cook on Stockholders, secs. 4*a*, 619. One person may incorporate himself under the Iowa statutes, and conduct the corporate business without directors.

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Iowa Code, sec. 1088; Cook on Stockholders, sec. 709. (5) Davis was a creditor of the corporation, and as such had a right to have a majority of the shares of stock filled out in his own name, but retained in the stock book, in the possession of the company, without paying anything for it, and could vote such shares and elect himself director, to control the corporate affairs, in his interest as a creditor, without thereby constituting himself a stockholder. He could exercise the voting privilege of a stockholder without becoming the actual owner of the stock. *Burgess v. Seligman*, 107 U. S. 20; 92 Mo. 635. (6) If the sole object of his sitting in the board as a director was the protection of his interest as a creditor, his paying for one share, for the purpose of enabling him to sit in the board for that sole purpose, could not modify the principle above stated. (7) There is no stock until the stock is issued to shareholders; up to that time there is a mere possibility or privilege of the creation of stock. *Chouteau v. Dean*, 7 Mo. App. 214; *Burgess v. Seligman*, 107 U. S. 37. (8) The liability here in question is a statutory liability. The Iowa statute which created the liability prescribed a special method for its enforcement, to-wit: The stockholders' property must be taken upon an execution issued against the corporation, thus making a judgment against the corporation a condition precedent. Iowa Code, secs. 1082, 1083; *Bayliss v. Swift*, 40 Iowa, 651; *Bank v. Green*, 64 Iowa, 448. This remedy is exclusive and not cumulative, and must be pursued in every state. Cook on Stockholders, sec. 223; *Lowry v. Inman*, 46 N. Y. 119–127; *Morley v. Thayer*, 3 Fed. Rep. 737–749; *Erickson v. Nessmith*, 15 Gray, 221; *Knowlton v. Ackley*, 8 Cush. 917; *Dauchy v. Brown*, 24 Vt. 197; *Pollard v. Bailey*, 20 Wall. 527; *Bank v. Franklyn*, 120 U. S. 758. (9) The allowance of plaintiff's claim by the assignee does not change the

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principle, for the reason that no execution can issue against the corporation on the assignee's judgment of allowance. (10) Statutory provisions which impose on stockholders a liability for corporate debts for a common-law or stock liability are intended to break down that protection which corporations are intended to afford to stockholders, and are, therefore, in derogation of common law, and must be construed with the greatest strictness. Cook on Stockholders, sec. 214; *Sayles v. Brown*, 40 Fed. Rep. 8. (11) By honest mistake a defective notice was published as required by statute within three months. As plaintiff does not claim ever to have read the notice or to have been influenced or deceived by it in giving credit, only the state could take advantage of the difficulty on *quo warranto*, inasmuch as the corporation came into existence prior to the publication of notice, and which publication was a matter required to be made after corporate existence had been achieved, and not as a condition precedent thereto. *Bank v. Davies*, 43 Iowa, 424; *Stokes v. Findley*, McCreary, 211; *Mining Co. v. Richards*, 95 Mo. 111. (12) The second notice was sufficient, and, although not published within three months, was published before the corporation entered upon any business. Such subsequent publication was permissible under the laws of Iowa. *Bank v. Davies*, 43 Iowa, 425, 435. (13) The fact that the notice was published on Sunday would not invalidate it. 1 Daniel on Negotiable Instruments [4 Ed.] p. 88; 2 Benjamin on Sales, sec. 842; *Glover v. Chouteau*, 19 Mo. App. 656; *Haufman v. Hamm*, 30 Mo. 388; *Eason v. Witcofsky*, 29 S. C. 245; *Johnson v. Day*, 17 Pick. 109; *Clough v. Shepherd*, 31 N. H. 490; *Pierce v. Atwood*, 13 Mass. 324; *Smith v. Ibling*, 47 Mich. 614; *Miles v. McDermott*, 31 Cal. 271; *Saylor v. Palmer*, 31 Cal. 240; *Gosweiler's Estate*, 3 Pa. 200; *Thayer v. Felt*, 4 Pick. 354; *Kellog*

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v. Karrico, 47 Mo. 158; *Burk v. Daily*, 14 Mo. App. 545. (14) The liability sought to be enforced is penal, and cannot be enforced by the courts of Missouri. Cook on Stockholders, sec. 223; *Sales v. Brown*, 40 Fed. Rep. 8–13; *Derrickson v. Smith*, 27 N. J. L. 166; *Halsey v. McLean*, 12 Allen, 438, approved in *Engine Co. v. Hubbard*, 101 U. S. 188; *Bank v. Price*, 33 Md. 487; *Wilds v. Suydam*, 64 N. Y. 173; *Flash v. Conn*, 109 U. S. 37; *Bird v. Hayden*, 1 Rob. (N. Y.) 383; *Ochiltree v. Railroad*, 54 Mo. 117; *Kritzer v. Woodson*, 19 Mo. 327. (15) The plaintiff could not have enforced this liability against Davis in the method here pursued, if he had brought his suit in the state of Iowa, and under the provisions of section 1 of the Missouri act of April 20, 1891, he cannot proceed by any other method in this state.

Henry Hitchcock, for respondent.

(1) Appellant was a stockholder in the Eagle Glass & Metal Company, within the provisions of section 1068 of the Iowa Code, at and before the date when the debt sued for was contracted, to-wit, June, 1890. In July, 1889, appellant became legal owner of ten thousand shares of said stock. To constitute a person a stockholder in a corporation it is not necessary that a certificate should have been issued to him. *Schaeffer v. Ins. Co.*, 46 Mo. 248, 250; *Erskine v. Loewenstein*, 82 Mo. 301, 306; *Spring Co. v. Harris*, 20 Mo. 383, 390; *Bank v. Gifford*, 47 Iowa, 575; *Ins. Co. v. Sherwood*, 72 Mo. 461; *Brigham v. Meade*, 10 Allen, 255; Cook on Stockholders, secs. 373, 383. On June 10, 1890, appellant bought of the company one share of "treasury stock," paying $1 cash therefor, expressly to qualify himself as a director. On June 30, 1890, he voted that and other stock at a stockholders' meeting,

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was elected a director thereat, and thereafter acted as such. Under these facts, appellant is estopped from denying that he was a stockholder on and after June 10, 1890. Cook on Stockholders, sec. 52; 1 Morawetz on Corporations, sec. 308; *Bank v. Case,* 99 U. S. 631. It is immaterial whether appellant was a stockholder before or after the corporate debt here sued on accrued. *Barrick v. Gifford,* 47 Ohio St. 180; 21 Am. St. Rep. 104. (2) In the construction of a statute of a sister state, the courts of Missouri will follow the interpretation put upon such statute by the courts of that state. *McMerty v. Morrison,* 62 Mo. 140; *Lyman v. Campbell,* 34 Mo. App. 217; Endlich on Interpretation of Statutes, sec. 364; *Aultman's Appeal,* 98 Pa. St. 513; *Flash v. Conn,* 109 U. S. 378. The construction placed upon the Iowa statute in question by the supreme court of Iowa is that the statutory liability thereby imposed is not a penalty, but contractual in its nature; and that it is a primary liability, enforceable directly against the stockholder, without suit brought or judgment obtained against the corporation. *Bank of Davenport v. Davies,* 43 Iowa, 424; *Eisfeld v. Kenworth,* 50 Iowa, 389; *Marshall v. Harris,* 55 Iowa, 182; *Kaiser v. Bank,* 56 Iowa, 104; *Clegg v. Hamilton, etc., Co.,* 61 Iowa, 121; *Hodgson v. Cheever,* 8 Mo. App. 318, 321–2; *Hurt v. Salisbury,* 55 Mo. 310; *Richardson v. Pitt,* 71 Mo. 128. A like rule is applied in this and other states, and by the Unied States supreme court, in the following cases: *Corning v. McCullough,* 1 N. Y. 47; *Lowry v. Inman,* 46 N. Y. 119, 125; *Wiles v. Suydam,* 64 N. Y. 176; *Dennick v. Railroad,* 103 U. S. 18; *Flash v. Conn,* 109 U. S. 377; *Chase v. Curtis,* 113 U. S. 458; note to *Attrill v. Huntington,* 70 Md. 191; 14 Am. St. Rep. 353; notes to *Thompson v. Bank,* 19 Nev. 103; 2 Am. St. Rep. 797, 830, 832, 846–7, 850; *Bigelow v. Gregory,* 73 Ill. 197; *Ins. Co. v. Cram,* 43

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N. H. 641; *Harris v. McGregor*, 29 Cal. 124; *Field v. Cooks*, 16 La. Ann. 153. (3) The first notice of organization of the Eagle Glass & Metal Company, admitted to be the only notice published within the three months prescribed by the Iowa statutes, did not "comply substantially with the foregoing requisitions [of the statute] in relation to organization and publicity." *First.* In that it failed to state truly the amount of capital stock and the time of the commencement and termination of the corporation. *Eisfeld v. Kenworth*, 50 Iowa, 389; *Marshall v. Harris*, 55 Iowa, 182; *Argal v. Smith*, 3 Denio, 435. *Second.* In that, as charged in the petition and not denied in the answer, it was published only on Sunday, which was not a publication in the eye of the law. McClain's Annotated Code of Iowa, sec. 5438; *Shaw v. Williams*, 87 Ind. 158; *Scammon v. Chicago*, 40 Ill. 146; *Ormsby v. Louisville*, 79 Ky. Rep. 197; 4 Am. & Eng. Corp. Cases, 342, 344. *Third.* The second notice of incorporation, published in December, 1889, not being within the three months prescribed by the Iowa statute, was merely nugatory. The statute prescribes the date and period, equally with the contents, of the publication required to secure exemption from individual liability. *Bigelow v. Gregory*, 73 Ill. 200; 1 Morawetz on Corporations, secs. 27–8.

THOMPSON, J.—This action was brought by the creditor of a manufacturing corporation, organized under the laws of the state of Iowa but having its chief place of business in Missouri, to charge the defendant as a stockholder of such corporation for a debt, due by the corporation to the plaintiff upon an open account, in the sum of $1,535.50. A trial in the circuit court, before the judge sitting as a jury, resulted in a verdict and judgment for the plaintiff for the

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amount claimed, from which the defendant prosecutes this appeal.

In determining the questions presented by the appeal, we have had the very best aid from counsel on both sides, not only in the form of oral argument, but also in the form of very elaborate printed statements and arguments. We do not consider it incumbent upon us to go over all the details of these printed statements and arguments in drawing up this opinion, because we are convinced that the judgment must be affirmed upon a consideration of the law of Iowa as established by decisions of the supreme court of that state, when applied to certain undisputed facts shown by the record in this case.

The indebtedness of the corporation to the plaintiff in the sum stated is not controverted upon the pleadings or the evidence. It is averred in the petition and shown by the evidence that, subsequently to contracting the indebtedness sued on, the corporation made an assignment for the benefit of its creditors at St. Louis, Missouri, under the statute of this state; that the assignee has qualified and taken charge of the assets of the corporation; that the plaintiff's claim has been duly presented to assignee and by him allowed as a demand against the assets of the corporation. A paper inadvertently copied into the record shows that, since the date of the judgment, two payments have been made by the assignee upon the claim. These credits cannot be noticed here, because they could not have been brought to the attention of the trial court; but the defendant may have the benefit of them, if so entitled, as credits on the judgment.

The petition, which is quite full and detailed, bases the right of the plaintiff to charge the defendant with the indebtedness of the corporation on the ground that, although the corporation had become organized as

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such under the statutes of Iowa, yet, by reason of failing to comply with one of the provisions of those statutes in respect of publishing in a newspaper a certain notice, the corporators had not acquired exemption from individual liability for the debts of the corporation. The answer, which is also quite long and detailed, controverts the position of the plaintiff that such is the effect of the statutes of Iowa, as construed by the supreme court of that state, and also avers that, under those statutes, a creditor of a corporation cannot charge its stockholders without first having reduced his claim to judgment, and having had an execution issued against the corporation *nulla bona*. With this brief preliminary statement we shall take up and dispose of the questions arising upon the record, to which our attention has been invited by the counsel for the defendant, stating so much of the evidence as is applicable to each question, without undertaking to detail the evidence generally, and dealing with them in the order in which they are presented in the defendant's printed argument. All the questions, except the one relating to the judgment being excessive (which we shall dispose of incidentally), arise under the single assignment of error that the court refused to give an instruction requested by the defendant in the nature of a demurrer to the evidence.

I. The first proposition advanced in support of this assignment is, that the defendant was not a stockholder in the Eagle Glass & Metal Company (the corporation hereinbefore referred to) at the time the debt was contracted. The record conclusively shows that this assignment is untenable. Laying all other elements out of view, it conclusively appears that, prior to the dates of the contracting of this indebtedness, the defendant purchased one share of the capital stock of the corporation, paying therefor the sum of $1 to qualify him for his office of director, which office he

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held at the date of the contracting of the indebtedness. This made him a stockholder, and, for the purpose of charging him with liability as a stockholder under the Iowa statute on which this action is based, the holding of one share has the same effect in law as the holding of any number of shares.

Aside from this, we understand that this case was submitted to the circuit court on the theory of its being an action at law, as the record recites that the parties waived a jury. If the purchase of this one share were out of the way, the evidence in the record would amply support the conclusion of the circuit judge that the defendant was a stockholder at the time of the contracting of this indebtedness. He was one of the original incorporators, his name having been signed to the articles of incorporation. He was, from first to last, a director and officer. He was one of the active managers. He put money into the concern to further its objects. He signed certificates of stock as its assistant secretary. He was one of the signers of the contract drawn up by the seven corporators and signed prior to the date of the articles of association, describing with the most careful details the manner in which the stock should be disposed of. In fact, the evidence amply justifies the conclusion that he was from first to last a *corporator* and an *active member* of the corporation. By the laws of Iowa, a single person may become incorporate. Iowa Code, 1873, sec. 1088. By those laws, as construed by the supreme court of that state, a corporation for pecuniary gain may exist and do business as such without distributing its capital stock or having stockholders. *Johnson v. Kessler*, 76 Iowa, 411. The statute under which it is sought to charge the defendant is as follows: "A failure to comply substantially with the foregoing requisitions in relation to organization and publicity renders the individual property of

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the stockholders liable for the corporate debts." In its application to a corporation, which may assume to do business without formally issuing any stock, the word "stockholders" in this statute must necessarily be construed to mean corporators or members who have a direct financial interest in the business of the corporation, with a power to participate in the profits and in the conduct of its affairs; otherwise the statute would in such cases be nugatory. If necessary to uphold the decision of the circuit court, we should, therefore, have no hesitation in saying that such is its meaning when applied to a case where, as in this case, the co-adventurers have seen fit to transfer their shares back and forth upon their own books, without putting share certificates upon the market or even detaching them from their stubs.

Outside of this, the evidence shows that the corporation was organized for the purpose of purchasing from two persons who became its members, William H. Warren and Thomas F. Kennedy, a secret process for ornamenting glass, brass and other metals, known as "the Warren process;" that the value of this process depended on its being kept a secret process; that, prior to the incorporation, a contract was made and signed by all the seven corporators, including Warren and Kennedy and this defendant, in which Warren and Kennedy were parties of the first part and the other five incorporators, including this defendant, were parties of the second part. This contract undertook to provide, as among the associates, for the creation of the future company to purchase and work this secret process, and for the distribution of all of its capital stock. The capital stock was to be worth $2,000,000, divided into shares of $10 each, which shares were to be issued as "fully paid up and non-assessable." The contract recited "And of said shares, the second

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parties [that is, the five associates other than Warren and Kennedy, including this defendant] shall have and own one-fourth, or fifty thousand shares of the same; and the said first parties [that is, Warren and Kennedy] shall have and own seventy-five thousand thereof, and the remaining seventy-five thousand shares shall be sold at such price and terms as said board of directors may fix and determine, and out of the proceeds of such sale there shall be paid said first parties the sum of $150,000; but the money thus to be raised is in no manner whatever to create a liability on said second parties, or either of them, but the same is to come alone from the sale of said stock, and not otherwise. For said fifty thousand shares, said second parties are to pay into the hands of Dr. F. L. Haydel, trustee, for the corporation herein contemplated, the sum of $5,000; $1,000 to be by said trustee paid to said parties at the execution of this contract, and the balance, or the $4,000, is for the sole use of said proposed company in starting said business, and to be paid out for the same, as said trustee may deem wise and for the best interest of the same." This contract was signed on the twenty-first of June, 1889, and the articles of association were signed five days later. Without going into all details of the transactions had among the co-adventurers, and of the manner in which the stock was transferred and retransferred by them, without the detaching of the stock certificates from their stubs, it is important to call attention to the fact that on December 3, 1889, some changes of membership having in the meantime supervened, a supplemental contract was entered into modifying the former contract, by which the associates undertook to make a new distribution of the shares of the company, which had been formed and was in existence as a corporation. By this latter contract it was provided that: "Of the

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two hundred thousand shares of the capital stock of said company one-half thereof shall go to and belong to said company, to be solely and absolutely in its control and ownership; that the five parties above named and their successors [the parties of the second part to the original contract, including this defendant], or the successors of either of them, shall have ten thousand shares each, as by the contract, of which this is a modification, *they are entitled*, and the remaining fifty thousand shares shall belong to said Warren and Kennedy absolutely," etc. In pursuance of the contract of June 21, 1889, each of the associates, including this defendant, according to the testimony of the defendant himself, paid in the $1,000 making the aggregate of $5,000, which the contract provided that they should pay for fifty thousand shares of the stock of the company. This entitled them to those shares. This made each one of them a proprietor of the stock of the company to the extent of ten thousand shares. Whether they could hold the shares as fully paid up, if a creditor of the corporation were proceeding to charge them on the ground of not having paid for their shares, is a question which we need not consider, because that is not the theory of this action. The recitals from these two contracts in connection with the evidence of the defendant show that he became a proprietor in the company and a shareholder to the extent of this number of shares. And whatever might be thought of the contract which was made prior to the date when the corporation was formed, an attempt to argue that the associates could, by a contract made after it was formed, apportion and dispose of all of its shares, without themselves being shareholders, would seem to be hopeless. Taking all the facts together, the case before us seems to be one of the strongest possible cases in which one, who has acted as a shareholder

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and proprietor in a company, is estopped as against creditors from repudiating that relation. The mere fact that certificates were not detached from the certificate book and formally distributed, cuts no figure in the case; since it is well settled in this state and elsewhere that the certificate is only one of the evidences of the title of the shareholder, and that the issuing to him of a formal certificate is not necessary for the purpose of charging him with the liability of a shareholder in favor of a creditor. *Schaeffer v. Ins. Co.*, 46 Mo. 248; *Hawley v. Upton*, 102 U. S. 314; *Burr v. Wilcox*, 22 N. Y. 551; *Chase v. Bank*, 19 Pick. 564.

II. The next proposition advanced by the defendant in support of this assignment of error is, that this is not a common-law action to charge the defendant with liability as a partner at common law, on the ground that a corporate organization had not been effected, but that it is a statutory action proceeding upon a statute of Iowa. This proposition is obviously sound, and we do not understand that it is controverted. The petition recites, in substance, the formation of a corporation and the creation by the corporation of the indebtedness declared on, and the establishment of such indebtedness against the assets of the corporation, by proving it as a claim before the assignee of the corporation. But the petition also sets up a state of facts which, if true, shows that notwithstanding the formation of the corporation, by reason of failure to perform a certain condition upon which immunity was granted by the statutes of Iowa to the stockholders from the payment of corporate debts, those stockholders were left liable for the payment of such debts. We pass from this proposition of counsel for the defendant with the concession that the liability of the defendant must be determined upon a state of

admitted facts by the statute law of Iowa, as construed by the supreme court of that state.

III. The next proposition in support of the assignment, that the court should have granted an instruction for a nonsuit, is that the provisions of the statute law of Iowa have not been complied with, in that the plaintiff has not prosecuted his claim to a judgment against the corporation, and sued out execution against the corporation which execution has been returned *nulla bona*, showing that he has exhausted his remedy against the corporation, as he would be required to do in order to support a creditor's bill against the defendant. This argument is based chiefly upon the following section of the Code of Iowa: "In none of the cases contemplated in this chapter, can the private property of the stockholders be levied upon for the payment of corporate debts, while corporate pıoperty can be found with which to satisfy the same; but it will be sufficient proof that no property can be found, if an execution has issued on a judgment against the corporation, and a demand has been thereon made of some one of the last acting officers of the body for property on which to levy, and if he neglects to point out any such property." Code of Iowa, 1873, sec. 1083. Similar expressions are also found in sections 1082 and 1084 of the same body of statutes. We need not set out these statutes in further detail, because they have received a definite interpretation at the hands of the supreme court of Iowa, and that interpretation is opposed to the position of counsel for the defendant in this case. In *Marshall v. Harris*, 55 Iowa, 182, the plaintiff was a judgment creditor of the pretended corporation, and had collected a part of his judgment from the corporation, aud sued the defendants as stockholders to recover the balance, on the ground that those organizing the corporation had not complied

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with the provisions of the statutes in regard to publicity. He proceeded under section 1068 of the Code of Iowa, upon which the present action is founded. That section (again quoting it for convenience) recites that "a failure to comply substantially with the foregoing requisitions in relation to organization and publicity renders the individual property of the stockholders liable for the corporate debts." The answer averred, in substance, that the association had made an assignment to one Delzell; that the plaintiff's judgment, upon which the action was brought, had been rendered against Delzell, as assignee; that one of the payments made upon the judgment had been made by him; and that he was still assignee and had funds in his hands for the discharge of the debts of the association. It will be perceived that this defense sets up matter similar to that which was pleaded by the plaintiff and not denied by the defendant in the present case. A demurrer was sustained to the answer, and the supreme court affirmed the judgment. Adams, C. J., in giving the opinion of the court, disposed of this defense as follows: "In our opinion the defendants, under section 1068 of the Code above cited, became primarily liable for the debts of the association, and might have been sued in the first instance. Their relation to creditors is not, we think, different from what it would have been if no attempt had been made at incorporation. Credit is presumed to have been extended in reliance upon the individual liability of the members. In our opinion the demurrer was properly sustained."

The plaintiff in the present case is a judgment creditor of the corporation in the same sense as was the plaintiff in that case; for he has prosecuted his demand to an allowance before the assignee selected by the corporation itself under the Missouri statute to wind up

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its affairs, and the allowance of such an assignee is a judgment. *Nanson v. Jacob*, 93 Mo. 331. As already suggested, whatever payments may have been made or may still be made by the assignee subsequently to the date of the judgment of the circuit court in this case, will become credits upon the judgment and upon any execution issuing thereon; and, if not so allowed, the court will have power to see that they are allowed, on a motion in the nature of an *audita querela* to correct the execution.

But, if any doubt could be left upon this question, it seems to be absolutely concluded by the decision of the supreme court of Iowa in *Clegg v. Grange Co.*, 61 Iowa, 121, which, like the action before us, was an action upon an account to charge the defendants as members of the Hamilton & Wright County Grange Company, described in the petition as an unincorporated company or copartnership. The company had attempted to clothe itself with corporate immunities; but the plaintiff proceeded against its members as partners, upon the ground that they had not become incorporate by reason of having failed to comply with a condition precedent established by the statute, without compliance with which no incorporation could be effected. That condition precedent was, as in the case before us, the publication of the notice required by section 1063 of the Iowa Code of 1873. Instead of publishing a notice stating the facts required by that section, the co-adventurers published a notice which contained merely their articles of incorporation. These articles failed to show the place of transacting business by the corporation, and the time of the commencement and termination of its corporate existence, as required by the statute. For this reason it was held not to be such a notice as complied with the requirements of the statute. Without any extended reasoning upon the ques-

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tion the court said: "There was, then, 'a failure to comply substantially' with the requirements of the statute in regard to notice. The individual property of the stockholders is, therefore, liable for the corporate debts. Code, sec. 1068." This decision conclusively shows, what the language of the statute itself makes too plain for much discussion, that the publication of the notice prescribed by section 1063 within the time prescribed by section 1064 is a condition precedent, not necessarily to the existence of the corporation as an artificial body, but to clothing the members with the immunities of corporators. Section 1064, as amended and in force prior to the transactions in question, reads as follows: "The corporation may commence business as soon as the articles of incorporation are filed in the office of the recorder of deeds, and their doings shall be valid if a publication in a newspaper is made, and the articles recorded in the office of secretary of state within three months from such filing in the recorder's office." This plainly implies that, unless such a publication is made within three months their doings shall not be valid as corporate acts, at least so far as an exemption of their members from personal liability for their debts is concerned.

There are decisions, in this state and also in other jurisdictions, which would be applicatory to the question before us, if it were not a question which is conclusively governed by the interpretation which the highest court of Iowa has put upon the statutes under which this corporation was organized. An examination of these additional cases would be interesting, though irrelevant. It would probably serve no more than to show that, in respect of this and similar questions, courts have taken a distinction between acts required to be done by corporators in perfecting their corporate organizations, which are conditions precedent

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to the coming into existence of the corporation, and acts which are regarded as conditions subsequent and which do not prevent the immunities of corporators from attaching.

IV. The next proposition advanced in support of this assignment of error is that the statute of Iowa, upon which the action is founded, is *penal* and not contractual, and that it will, hence, not be enforced in Missouri. The proposition is, of course, well settled that penal statutes are local, and are not enforced on any principle of comity outside of the jurisdiction enacting them. We are of opinion that the statute, under which this action is brought, is not in the nature of a penal statute at all. The classes of statutes, referred to as penal statutes by counsel for the defendant, are statutes imposing a personal liability, generally upon directors and other officers of corporations and sometimes also upon stockholders for the failure to do certain prescribed things, such as to file certain reports or to give certain notices; or for the doing of certain prohibited things, such as the contracting of corporate debts beyond the prescribed limit, the declaring of fictitious dividends, or the contracting of corporate debts when the corporation is insolvent. None of these statutes have any resemblance to the one before us. As already seen, the construction placed by the supreme court of Iowa upon this statute is that it creates a condition precedent, which must be performed by those who organize a corporation before an immunity from liability for the debts of the corporation attaches. The meaning is that, when the legislature enacted the statute, it said to those desiring to avail themselves of its provisions: "You may become incorporated in the mode herein provided for, and you may exempt yourselves from personal liability for the debts of the corporation which you form, provided you

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give to the public a certain prescribed notice by publication in a prescribed way, and within a prescribed time; and unless you do this the state withholds from you the franchise or immunity of being exempt from liability for the debts which you incur in your character of a corporation aggregate, and leaves you to your common-law liability as partners." There is no element of penalty in such a statute, and for the plain reason that it does not take away from the corporators anything which the state has already granted to them. It merely withholds an immunity which the state is at perfect liberty to grant or to withhold, and hence to grant, if at all, upon its own conditions.

This becomes even more plain in its application to a corporation like the one before us. Something is said, in the printed argument, submitted on behalf of defendant, as to the right of citizens of one state to incorporate under the laws of another for the purpose of carrying on business in their own state; and it is argued that the law on this subject is progressing without definite results as yet. We do not proceed upon the idea, that the gentlemen who, desiring to form a corporation for the purpose of carrying on a manufacturing business in Missouri, found that the incorporation laws of Missouri were not good enough for their purposes, or, for some other reason satisfactory to themselves, determined to procure an incorporation under the laws of a sister state, placed themselves, in respect of their personal liability, in any worse condition than if their plant and place of business had been established in such other state. Such corporations have become the serious concern of the legislatures of many of the states, and in recent years have come to be definitely known as "tramp corporations." Whatever may be said about them, it is clear that the most that can be said in favor of the franchises, which their

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members acquire in the state of their *de facto* domicile, cannot be greater than those which they would have acquired, if they had remained and conducted their business in the state of their legal domicile, under whose statutes they were organized. In other words, a number of gentlemen residing in Missouri, desiring to carry on a business under the form of a corporate organization in Missouri, cannot, under any principle of public policy with which we are acquainted, be allowed to acquire in Missouri, by virtue of their incorporation in Iowa, any greater rights than they have acquired in Iowa. They cannot, by the shift of incorporating in another state, import into this state, under the guise of being exempt from foreign penal statutes, any greater immunities or franchises than they possess in the state of their incorporation.

We have been referred to the decision of the supreme court of Missouri in *Kritzer v. Woodson*, 19 Mo. 327, in support of the proposition, that the liability sought to be enforced in this action is penal. That decision is not at all in point, because the effort there was to subject the directors of a corporation to a liability under a statute for contracting debts in behalf of the corporation in excess of a prescribed limit. Such statutes are generally regarded as penal even as regards directors, and for stronger reasons as regards stockholders. We are also cited to the case of *Ochiltree v. Railroad*, 54 Mo. 117. In that case there is a *dictum* by Judge Napton (citing *Kritzer v. Woodson*, *supra*, which is not in support of the dictum), that the double liability of stockholders, created by the constitution of this state of 1865, which was under consideration in that case, was in the nature of a penalty. The mere superadded individual liability of a stockholder to pay the amount of his stock subscription over again, if necessary to liquidate the debts of the corporation when

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it became insolvent, has never been regarded by the courts of this country as a penalty. It is a part of the contract which he enters into, in plain view of the statute, when he becomes a member of the corporation. The meaning is that, to this extent, the state withholds from him the usual grant of immunity from liability for the debts of the corporation. Such statutes are constantly enforced outside of the states enacting them, as, for instance, in actions prosecuted in the state courts against non-resident stockholders of insolvent national banks to subject them to this species of liability.

V. We have endeavored to dispose of these questions perhaps out of their logical order, but in the order in which our attention has been called to them in the defendant's argument. The last question is perhaps the one which should have been first disposed of, and which we should not think it necessary to touch upon at all, but for the fact that it involves a challenge on the part of counsel for the defendant. Their contention is that the notices published in behalf of the Eagle Glass & Metal Company were a sufficient compliance with the Iowa statute. That statute reads as follows:

"Sec. 1062. A notice must also be published, for four weeks in succession, in some newspaper as convenient as practicable to the place of business.

"Sec. 1063. Such notice must contain: 1. The name of the corporation and its principal place of transacting business. 2. The general nature of the business to be transacted. 3. The amount of capital stock authorized, and the times and conditions on which it is to be paid in. 4. The time of the commencement and termination of the corporation. 5. By what officers or persons the affairs of the corporation are to be conducted, and the times at

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which they will be elected. * * * 7. Whether private property is to be exempt from corporate debts.

"Sec. 1064 (as amended by chapter 23 of the Acts of the Seventeenth General Assembly). The corporation may commence business as soon as the articles of incorporation are filed in the office of the recorder of deeds, and their doings shall be valid if the publication in a newspaper is made, and the articles recorded in the office of the secretary of state within three months from such filing in the recorder's office."

"Sec. 1068. A failure to comply substantially with the foregoing requisitions in relation to organization and publicity renders the individual property of the stockholders liable for the corporate debts."

The articles of incorporation, signed by four of the co-adventurers, among them this defendant, bear date as of the twenty-sixth of June, 1889. The notice which was made, and which was intended to comply with the statute, was published in the *Daily Gate City*, a newspaper printed in Keokuk, Lee county, Iowa, four times at intervals of a week, on first, eighth, fifteenth and twenty-second of September, 1889, all of which days were Sundays. The notice, as published, failed to comply with the statute in the following particulars: *First.* It stated that "the amount of capital stock shall be $5,000,000 divided into shares of $10 each, to be paid when called for by board of directors." As already seen, the capital stock was in point of fact $2,000,000, and the shares were not issued in the ordinary way, to be paid for in assessments or in calls as made by the board of directors, but they were issued as "fully paid up and non-assessable," and were apportioned by a contract among the co-adventurers antedating the articles of incorporation, under which apportionment a number of them were to be paid for

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by Warren and Kennedy by the disclosure of a secret process for ornamenting glass, etc., of an unknown and speculative value. Another portion amounting to fifty thousand shares was, as already seen, to go to the other five co-adventurers in consideration of $5,000, furnished by them, $1,000 each, towards starting the company; while the remaining shares were to be vested in a trustee as "treasury stock," and sold to raise the actual working capital of the company. Such being the actual distribution of the stock among the proprietors, a notice stating to the public that the shares were "to be paid when called for by the board of directors," was not, and could not have been seriously intended to be, a compliance with the provisions of the statute which requires the notice to state "the time and conditions upon which it is to be paid in." The notice was well calculated to deceive the public into what an ordinary business man would understand from its language—that the stock was issued in the ordinary way as assessable stock, subject to assessments or calls made by the directors according to the needs of the company; whereas, in point of fact, not a single share of it was ever issued or intended to be issued in that way. Even the treasury stock was intended to be put on the market at what could be obtained for it. One resolution authorized the sale of some of it at $3 per share, and another at $1 per share, whereas its par value was $10 per share.

The notice was also defective in another particular, which obviously grew out of a clerical or typographical error. It recited: "Business was commenced June 28, *1899*, and corporation to continue twenty years from said date, renewable from time to time by vote of stockholders." If this defect stood alone, there would be ground for argument that it involved an obvious typographical error which would

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correct itself in the mind of the ordinary reader, since it would be absurd to say that business *was* commenced June 28, 1899, but that as the year of publication was 1889, and as the date of publication was later than June 28, and as the statute required the publication to be made within three months from the filing of the articles in the office of the recorder of deeds, every intelligent man would understand this to be a typographical error for 1889.

It is argued that the defect in the notice, which consisted in using the number *five* instead of *two* in expressing the amount of capital stock of the corporation, making it read five millions instead of two millions, is also to be rejected as a typographical error. It is quite immaterial whether it is a typographical error or not, since there is nothing in the context from which the ordinary reader would or could correct the error. The statute imposed upon the co-adventurers the obligation of stating "the amount of capital stock authorized," and they did not state it correctly; and for this reason they did not comply with the statute so as to exempt themselves from personal liability, under the decisions of the supreme court of Iowa already referred to. The case is not different in principle from the case of *Clegg v. Grange Co.*, 61 Iowa, 121, already referred to, where the co-adventurers published their entire articles of incorporation, which articles were themselves defective in not stating the time of the commencement and termination of the corporate existence; for which reason it was held that the members did not become incorporate in the sense which exempted them from the personal liability of partners. The notice, as published, being thus radically defective, it is not necessary to consider whether the publication on Sunday was such a publication as would otherwise have complied with the statute.

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VI. The co-adventurers, discovering the defectiveness of this publication, undertook to cure it by the publication of a subsequent notice, which publication began on the nineteenth of December, 1889, and ended on the ninth of January, 1890. This notice correctly stated the amount of the capital stock and the date of the commencement and termination of the corporation. But, instead of stating the actual facts as to the times and conditions on which the capital stock was to be paid in, as demanded by the statute, it stated exactly what the previous notice had stated—that it was "to be paid when called for by the board of directors." Even if the provision of the statute (Iowa Code of 1873, sec. 1064, above quoted), which demands the publication of this notice within three months of the filing of the articles of incorporation in the office of the recorder of deeds, were out of the way, yet it is plain that the second publication did not help out the first, because it was defective in the same way as the first in one of the most essential particulars— that of advising the public as to the times and conditions on which the capital stock was to be paid in. Anyone would surely suppose that a corporation advertised as having a capital stock of $2,000,000 divided into shares of $10 each, to be paid, "when called for by board of directors," would be entitled to more credit than a corporation having a capital of $2,000,000, all of it issued as "paid up and non-assessable," one-fourth of which had been, by the supplemental contract of December 3, apportioned to two of the co-adventurers in payment of a supposed secret process of manufacture which they had never disclosed, another fourth apportioned to five of the co-adventurers in exchange for $5,000 advanced by them, and the remaining one-half vested in a trustee as "treasury

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stock," to be sold for the purpose of raising capital at such prices as might be obtained for it.

These observations seem to dispose of all the arguments advanced in support of the assignment, that the court committed error in refusing the defendant's instruction in the nature of a demurrer to the evidence, and the judgment is accordingly affirmed. ROMBAUER, P. J., concurs. BIGGS, J., concurs in the result.

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THE STATE OF MISSOURI *ex rel.* WM. F. HUSTON, Appellant, v. JOHN L. GANZHORN, Respondent.

Kansas City Court of Appeals, January 2, 1893.

1. **Justices' Courts:** TITLE TO LAND: INFORMAL AFFIDAVIT: DUTY OF JUSTICE. Though the plea and affidavit attempting to inform the justice that the title to real estate is involved be informal, and fail to comply with the statute, yet, if the question decisive of the case is whether or not the plaintiff has the title, the jurisdiction of the justice ceases, and it only remains for him to perform the ministerial duty of transmitting the papers to the circuit court.

2. **Appellate Jurisdiction:** COURTS OF APPEALS: MANDAMUS TO JUSTICE: TITLE TO LAND. The courts of appeals have no appellate jurisdiction to review the judgment of the circuit court in a *mandamus* proceeding to a justice of the peace to compel him to transmit the papers in a case pending before him to the circuit court, on the ground that the title to real estate was put in issue therein; the supreme court alone having jurisdiction to supervise and review the lower courts in proceedings in which the title to real estate is involved. *(State ex rel. v. Rombauer,* 101 Mo. 499, *followed, and Bennett v. McCaffrey,* 28 Mo. App. 220, *denied.)*

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

TRANSFERRED TO SUPREME COURT.

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H. M. Meriwether and *C. O. Tichenor*, for appellant.

(1) The court should have held that it appeared from the face of the proceedings before Ganzhorn that title to real property was in issue, and that it was, therefore, his duty to certify said cause to the circuit court. Revised Statutes, 1889, secs. 6124, 6219. (2) The plea of title filed in said cause was full and complete. It was correctly made and left no pretense of discretion or doubt as to the duty of Ganzhorn in the premises. The case of *Bennett v. McCaffrey*, 28 Mo. App. 220, furnishes all the authority or precedent needed in this. *Meier v. Thieman*, 90 Mo. 433; *State ex rel. v. Clayton*, 34 Mo. App. 568. (3) But the question before this court cannot be said to involve the title to any real estate, because it will not fall to this court's lot to decide who has the title. Neither party may have the title for aught this court can ever know or ever guess from the argument of this cause before it. In the first proposition this court is asked to pass upon the affidavit; in the second, to pass upon the petition, but in neither event to pass upon the title. We simply wish this court to make the circuit court pass upon the title.

W. A. Alderson, for respondent.

The complaint filed in the cause before the respondent, a justice of the peace, which has produced this litigation, brings that case within the provisions of sections 6397 to 6399, Revised Statutes. We find judicial authority in this state in support of the proposition that the justice of the peace, respondent, had jurisdiction to hear and determine the cause of Hurd *et al.* against appellant. *Green v. Sternberg*, 12 Mo. App. 578; *Green v. Sternberg*, 15 Mo. App. 32.

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SMITH, P. J.—This is a proceeding against a justice of the peace to compel him to certify a cause and transmit the papers and process therein to the clerk of the circuit court, for the reason that the defendant therein had filed an affidavit putting the title to real estate in issue therein as provided in section 6219, Revised Statutes, 1889. The complaint and the sworn plea of defendant (if such it may be termed), setting up that title to real estate was in issue, were set out in the alternative writ, and the correctness of which were admitted by the return of the justice. It is thus made to appear that the proceeding before the justice was based, or intended no doubt to be, upon the provisions of sections 6397, 6398 and 6399. Defendant therein filed a statement wherein he denied that he was the tenant of the plaintiffs or had ever recognized them as owners of the premises; that he was the tenant of T. J. Hudson, the legal owner of the title to the premises. It was not verified by the oath of the defendant, or by that of any person in his behalf. There was, however, appended the oath of Fred. M. Hays, to the effect that "he was one of the agents of T. J. Hudson, who claims to be the owner of said premises; that the above claim is made in good faith and not for delay, but because the title to said property is involved in this suit."

Viewed as a pleading it is certainly very informal. It may be well doubted whether it is the pleading contemplated by the statute. It is certainly not verified either by the oath or affidavit of the defendant or by anyone in his behalf. But, while this is so, we think that it sufficiently appears from the complaint and statement filed by the defendant whether the latter be denominated a pleading or not, that the title to real estate is the dominating issue in this case. The question decisive of the case was whether or not the plaintiffs had acquired the title in the manner they

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alleged in their complaint. The defendant's statement claims that the title is outstanding in another under whom he holds the possession. This is a denial by implication of the plaintiffs' title, so the issue of title is thus presented for the decision of the court having jurisdiction of actions involving title to real estate. In this view of the case the justice was without jurisdiction to proceed with the cause, and it only remained for him to perform the ministerial duty of transmitting the papers to the circuit court as required by statute.

But, conceding that the title to said real estate was in issue before the justice, still have we jurisdiction of the appeal? This question we are now bound to decide. By section 12, of article 6, of the constitution, it was provided that appeals should lie from the decisions of the St. Louis Court of Appeals to the supreme court, and writs of error should issue from the supreme court to said court in the several cases in the section enumerated. By the fifth section of the amendment extending the jurisdiction of the St. Louis Court of Appeals, and establishing the Kansas City Court of Appeals, it is provided that, in all cases or proceedings reviewable by the supreme court, writs of error shall run from the supreme court directly to the circuit courts, and in all causes or proceedings appeals shall lie from such trial courts directly to the supreme court, and that the supreme court shall have exclusive jurisdiction of such writs of error and appeals. So that this amendatory section placed the several cases enumerated in said section 12 without the jurisdiction of the courts of appeal.

In *State ex rel. v. Rombauer*, 101 Mo. 499, it is stated that the supreme court remains the final arbiter in all those cases enumerated in section 12, article 6, of the constitution, and that the courts of appeal are without jurisdiction, original or appellate, in any of

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such cases. The original as well as the appellate jurisdiction of these appellate courts is confined to those cases the subject-matter of which is not within the appellate jurisdiction of the supreme court. By the terms of said section 5 of said amendment to the constitution, it is expressly provided that the supreme court shall in all cases enumerated in said section 12, article 6, of the constitution *exclusively exercise superintending control over such trial courts*, so that the supreme court is not only given the exclusive jurisdiction of appeals and writs of error in the ten classes of cases specified in said section 12, but is required in all such cases to exclusively exercise superintending control over the trial courts in respect to all of such cases.

Since the subject-matter of this proceeding is a case involving title to real estate, it is quite difficult to understand why under the constitutional provisions already referred to it is not without our jurisdiction. It is quite true that this is not an appeal from a decision by the trial court of an issue of title to real estate, but the subject-matter of the appeal is so related to a case which does involve the title to real estate as to exclude our appellate jurisdiction.

If the defendant in the suit before the justice had applied to us to issue the writ of *mandamus* or prohibition against the justice by virtue of the power given us by said section 12, article 6, of the constitution, to issue these and other remedial writs and to hear and determine the same, and we had done so, the very first question we should have been obliged to decide would have been whether the title to real estate was in issue in the case about to be tried before him. Would not the determination of that fact in the affirmative have excluded our jurisdiction as well as that of the justice?

How could we exercise a superintending control over the justice to revise his action in respect to

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a cause over which we in no event have jurisdiction? We do not think by virtue of our power to issue the remedial writs mentioned in said section 12, article 6, of the constitution, that we are authorized to exercise a superintending control over a justice of the peace in a case where the title to real estate is in issue. We cannot discover that our original jurisdiction is greater than our appellate jurisdiction in any case. The boundary lines of our original and appellate jurisdiction as fixed by the constitution seem everywhere to coincide. We have not only no jurisdiction, original or appellate, in any of the cases specified in said section 12, article 6, of the constitution, but we have by virtue of such jurisdiction no superintending control over any court wherein such cases originated in respect thereto. As, for illustration, if a case falling within any one of the several classes enumerated in the said constitutional section arises in any court it is not within our jurisdiction, original or appellate, to exercise any superintending control over such court in respect to such a case. We cannot directly or indirectly order the court in which such a case is pending to take any steps in relation thereto, for, if we did, such an order would be *coram non judice.*

It is quite true, as contended by the relator, that the circuit court was not called upon in this proceeding to decide the issue of title, yet it was called upon to decide a question in a case which did involve title and over which it must be conceded we have no jurisdiction.

The action of the circuit court in such cases is subject alone to the supervising control of the supreme court. Since the decision in 101 Mo. 499, *supra*, and that rendered by us in *State ex rel. v. Allen*, 45 Mo. App. 551, we do not feel bound to follow the case of *Bennett v. McCaffrey*, 28 Mo. App. 220, decided by the St. Louis court of appeals.

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Entertaining these views, we feel that the only disposition we can make of the relator's appeal is to certify it to the supreme court, which is ordered accordingly. All concur.

CHARLES WYLIE, Respondent, v. GILES M. WADDELL, Appellant.

Kansas City Court of Appeals, January 2, 1893.

1. **Forcible Entry and Detainer:** ACTUAL FORCE: INSTRUCTION. No actual force against plaintiff's possession is necessary to maintain the action of forcible entry and detainer, and an instruction set out in the opinion was properly refused.
2. ——: COMMON INCLOSURE: INSTRUCTION. A common inclosure of a number of fields owned by different parties and pastured in common will not destroy such an actual possession of either field as to defeat an action of forcible entry and detainer, and an instruction set out in the opinion *held* properly refused.
3. **Instructions:** NO EVIDENCE. Instructions without evidence to support them are properly refused.

Appeal from the Holt Circuit Court.—HON. CYRUS A. ANTHONY, Judge.

AFFIRMED.

L. R. Knowles, *J. W. Stokes* and *Kelley & Kelley*, for appellant.

(1) Unless there is use of force or threats or intimidation, there is no forcible entry. 8 American & English Encyclopedia of Law, 106, and notes; *Hall v. Trucks*, 38 Ark. 257. (2) The plaintiff must have had actual possession at the time of the entry by defendant. Joint possession with others of several

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hundred acres, of which the land in controversy is a part, is not sufficient. (3) Defendant's second instruction should have been given. If defendant entered wrongfully by disseizen, without force, a demand in writing was necessary. *Witte v. Quinn*, 38 Mo. App. 681; *Hyde v. Goldsby*, 25 Mo. App. 29; *Andrae v. Heinritz*, 19 Mo. 310. (4) If the land was in the bed of the Missouri river, and was never surveyed, it was not within the jurisdiction of the courts of Holt county. (5) The plaintiff was not in the actual and exclusive possession of the land; he could not recover. Therefore, the court erred in refusing defendant's fourth instruction.

T. C. Dungan and *Huston & Parish*, for respondent.

(1) The lower court did not err in giving the first instruction on behalf of the plaintiff. "An entry and detainer against the will of the party in possession is forcible." *Dennison v. Smith*, 26 Mo. 487; *Wunsch v. Gretel*, 26 Mo. 580; *Krevet v. Myer*, 24 Mo. 107; *McCartney v. Auer*, 50 Mo. 395; *DeGraw v. Prior*, 53 Mo. 313; *Bradley v. West*, 60 Mo. 59; *Willis v. Stevens*, 24 Mo. App. 494. (2) The court did not err in giving plaintiff's second instruction. *First.* The plain English and grammatical construction makes the words "and against his will" apply to the entry and detainer. *Second.* Any overt act indicating dominion and a purpose to occupy is actual possession, and will support the action. *Bartlett v. Draper*, 23 Mo. 407; *King v. Gas Co.*, 24 Mo. 34; *McCartney v. Alderson*, 45 Mo. 36; *Miller v. Northup*, 49 Mo. 397; *Bradley v. West*, 60 Mo. 60; *Willis v. Stevens*, 24 Mo. App. 500. (3) This is not a case of "joint possession with others of several hundred acres." It is a case of joint inclosure, each

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party using and possessing in severalty their respective parts within the inclosure.

Ellison, J.—This was an action of forcible entry and detainer whereby possession of a tract of land is sought by plaintiff. He recovered below, and defendant has brought the case here. An examination of the record satifies us that the appeal is not well grounded. The instructions given for plaintiff are those which have been so frequently given in such cases, and have so frequently been upheld by the appellate courts of this state, that we need not enter into a discussion of their merit, save to remark that there was evidence upon which to base them. The following instructions were refused for defendant: "2. The court instructs the jury that although they may believe from the evidence that, at the time the defendant entered upon the land described in plaintiff's complaint, the plaintiff was in actual possession of said premises, and exercising visible acts of ownership over the same, yet, if the jury believe from the evidence that the defendant entered upon said premises wrongfully and without force, by disseizen, that is, by entering upon the same by passing through an opening in a fence without using any force or in any wise making or aiding in making such opening, in the absence of and without the knowledge of the plaintiff, and continued in said possession to the commencement of this suit, then the jury should find for the defendant, unless the plaintiff made demand in writing on defendant to deliver possession of the same to him before the commencement of this suit, and there is no evidence that such demand was made."

"4. If the jury believe from the evidence that, at the time defendant entered upon the premises mentioned in the plaintiff's complaint, the plaintiff was not

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in the actual and exclusive possession of the same, but that said premises had been inclosed with lands belonging to other parties, as a common field or inclosure, by one fence around the same, and that said other parties had been and were using said inclosure, of which said lands mentioned in plaintiff's complaint formed a part, in connection with plaintiff, then and in that case the verdict should be for the defendant."

The second was properly refused. No actual force against plaintiff's possession is necessary. The fourth was also properly refused. The first part of it had been embodied in an instruction for defendant which was given. The other part as to a common inclosure of this and other lands could not affect plaintiff if he was in possession of the part of which he was dispossessed. A common inclosure of a number of fields owned by different parties and pastured in common will not destroy such an actual possession of either field so as to defeat an action of forcible entry and detainer.

There was no evidence as to the change in the channel of the Missouri river, or as to the boundary lines of Holt county, or the boundary line between Missouri and Nebraska, or as to where the Missouri river ran twenty-five years ago. Instructions on these matters were, therefore, properly refused. The judgment will be affirmed. All concur.

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MILLARD F. COOLEY, Appellant, v. JAMES F. GOLDEN *et al.*, Respondents.

Kansas City Court of Appeals, January 2, 1893.

1. **State Boundary:** PLATTE PURCHASE ACT: MISSOURI RIVER. The act of congress of June 7, 1836, extending the jurisdiction of the state of Missouri over the lands lying between its western boundary and the Missouri river carried the western boundary of the state to the center of the channel of the river.

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2. ———: CHANGE OF CHANNEL: OF BED. When a river is declared to be the boundary between states, although it may change imperceptibly from natural causes, the river as it runs continues to be the boundary; but, if the river suddenly change its course or desert its original channel, the boundary remains in the middle of the deserted bed.

3. State Jurisdiction: CONCURRENT OVER MISSOURI RIVER, NOT OVER DESERTED BED. The state of Missouri has concurrent jurisdiction over the entire channel of the Missouri river, while it forms a common boundary of this state and Nebraska, but when the river abandons its channel the jurisdiction extends only to the boundary line, the middle of the old channel before the change.

4. ———: FORCIBLE ENTRY. The concurrent jurisdiction over a river forming a common boundary is not believed to confer authority upon one state to bring forcible entry and ejectment for the recovery of land within the limits of the other.

Appeal from the Atchison Circuit Court.—HON. CYRUS A. ANTHONY, Judge.

AFFIRMED.

Lewis & Ramsay, for appellant.

(1) The court erred in refusing to give instruction number 4 to the effect that in the absence of other evidence the middle of the main channel would be presumed to be in the middle of the river bed, that is, half way between the Missouri and Nebraska shores, as they existed at time of cut-off. The center of the channel is the boundary. See act April 19, 1864, admitting Nebraska, 13 United States Statutes, 47; 2 Brightly's Digest, p. 340; Angell on Watercourses [Ed. 1869] sec. 10, p. 16, note 2; Angell on Watercourses, sec. 101; *Alabama v. Georgia*, 23 How. 515; *Missouri v. Kentucky*, 11 Wall. 395; *Jones v. Soulard*, 24 How. 41; *St. Louis v. Rutz*, 138 U. S. 226–257; *Smith v. Public Schools*, 30 Mo. 290. Under all the evidence there is scarcely a question but that the land in controversy is on that half of the old bed lying on

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the Missouri side of the center of the river. (2) The court erred in not giving instructions 5 and 6, asked by plaintiff, for the reason that the state of Missouri had concurrent jurisdiction with the state of Nebraska over the whole of the old bed of the Missouri river. See act of Congress, March 6, 1820, authorizing admission of Missouri; *Swearingen & Covill v. Steamboat*, 13 Mo. 519; *Sanders v. Anchor Line*, 97 Mo. 26. See also constitution of Missouri, article 1, section 1. The reasons for this jurisdiction are, if possible, stronger than when the river ran there. The boundary line is more uncertain, and violations of law far more frequent in this old bed of the river than when the water ran there.

Malcolm & McKillop, for respondents.

(1) The middle of the channel is the boundary line between Missouri and Nebraska. The main channel is the place where the water flows at ordinary stages, and does not include the flats and sandbars over which the water extends in times of high water. *Alabama v. Georgia*, 23 How. 505–515; *Handley's Lessees v. Anthony*, 5 Wheat. 375. The main channel according to the testimony was north of the lands in controversy in 1867, at the time of the cut-off. The center of that main channel was at that time the boundary between Missouri and Nebraska. Constitution of Nebraska, art. 10; *Railroad v. Devereux*, 41 Fed. Rep. 14; *The Schooner Fame*, 3 Mason, 147; *Handley v. Anthony*, 5 Wheat. 374; 7 Opinions Attorney General, 175. That was not changed by the cut-off of 1867. *Missouri v. Kentucky*, 11 Wall. 395; Angell on Watercourses [5 Ed.] sec. 57; Gould on Waters, sec. 159, p. 292; *Holbrook v. Moore*, 4 Neb. 437; *Collins v. State*, 3 Tex. App. 323; *Trustees v. Dickinson*, 9 Cush. 544; *New Orleans v. United*

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States, 10 Pet. 662; *State v. Young*, 46 Vt. 565. (2) The "concurrent jurisdiction" named by appellant is over rivers, not dry land, and to that effect are the authorities he cites. The center of the main channel of the Missouri river as it was at the time of the 1867 cut-off is the boundary line between Missouri and Nebraska. This boundary is an imaginary line. Up to the line on one side is Missouri and on the other side is Nebraska. Missouri has no concurrent jurisdiction with Nebraska over the territory of that state nor has Nebraska concurrent jurisdiction with Missouri over the lands of the latter. *Land Co. v. Emmerson*, 38 N. W. Rep. 200; Gould on Waters, sec. 158; *Pollard v. Hogan*, 3 How. 212; 27 Fed. Dec., secs. 40, 41, 42, p. 987; *Zinc & Iron Co. v. Canal & Banking Co.*, 15 Atl. Rep. 227; *State ex rel. v. Railroad*, 33 Fed. Rep. 752.

SMITH, P. J.—This is an action of forcible entry and detainer which was brought before a justice of the peace of Atchison county.

By the act of congress, approved June 7, 1836, United States Statutes at Large, 34, entitled "An act to extend the western boundary of the state of Missouri to the Missouri river," it was provided that, when the Indian title to all the lands lying between the state of Missouri and the Missouri river should be extinguished, the jurisdiction over said lands should be thereby ceded to the state of Missouri. It is to be observed that the act ceded the land between the old state line and the river, and the extension of the boundary was to the river, not to the bank, thus making the natural watercourse the boundary; and the general rules, construing such words of cession as shown by the adjudged cases, carry that boundary to the center of the channel. *Benson v. Morrow*, 61 Mo. 345; *Jones v. Soulard*, 24

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How. 41; *Howard v. Ingersoll*, 13 How. 381; *Railroad v. Devereux*, 41 Fed. Rep. 14; *Missouri v. Iowa*, 7 How. 660. And this seems to have been the intention of congress; for it will be seen by reference to the act providing for the admission of the territory of Nebraska into the Union that one of the boundaries of the state so admitted should be from the junction of the Niobrara river down the middle of the channel of the latter river following the meanderings thereof, etc. 13 United States Statutes at Large, 47. It would be unreasonable to suppose that congress intended to limit the extension of the territorial jurisdiction of the state of Missouri to the bank of the Missouri, and thus leave a sort of neutral territory between the Missouri shore and the middle of the channel of the river over which neither the states of Missouri nor Nebraska had jurisdiction.

The constitution of Missouri, section 1, article 1, declared that the boundaries of the state as heretofore established by law are hereby ratified and confirmed; so that it is not to be doubted that congress by the ceding act extended the northern boundary line of the state to the middle of the channel of the Missouri river, and from thence down the river to the middle of the Kansas river. Act of congress of March 6, 1820, for the admission of Missouri; Revised Statutes, 1889, 47. In the cession act of June 7, 1836, is embraced what is commonly known as the "Platte purchase," consisting of a number of counties, among which is Atchison, situate in the northwest corner of the state.

At the time of the cession and until the year 1867, the Missouri river in its course along the western boundary of Atchison county made a horseshoe-shaped bend, with toe to the east, and heel pointing to the west. During the spring of the last-named year the river, during a great flood, changed its course by effecting a channel across the heel of the bend and thus

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abandoned its former channel around the bend. The bend became a lake and gradually filled up with sedimentary matter until it became solid land fit for tillage and pasture. The land, the possession of which is in dispute in this suit, is situate in the old abandoned bed of the river in this bend. The decisive questions in the case arise on the instructions given and refused by the court.

The theory of the plaintiff's instructions which were refused by the court was to the effect that if the lands in dispute were situate in the old bed of the river which had become dry on account of the change of its course by cutting off a bend on the Nebraska side and forming a new channel, then in that case it was not material on which side of the main channel of the old river bed the lands in dispute were situate. The theory of the defendant which was adopted by the court was that the ordinary boundary of Atchison county where it borders on the Missouri river extended to the middle of the main channel of the river as the main channel ran or was located in the year 1867 prior to the change or cut-off, and that, unless it was found the land in question was situate in Atchison county, the plaintiff could not recover. The defendant's theory further was that the boundary line of the state of Missouri at the location in question was the middle of the main channel of the Missouri river as the main channel ran before the cut-off in 1867. These theories are wholly irreconcilable. The jury found under the instructions that the land in dispute was not in Atchison county, and, as there was substantial testimony tending to establish that fact, the finding is conclusive upon us. It seems that the river by its changed course cut off a considerable area of land which was formerly on the Nebraska side, but is now on the Missouri side of it, so that the river as it runs along

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the western border of this area of cut-off land is wholly within the state of Nebraska.

It is not contended, as we understand it, that the change of the course of the river in 1867 effected a change of the boundary line between the two states as it was fixed in the ceding act, for, if it were, such contention could not be sustained, because it is plain to be seen that the allowance of such consequences might result most disastrously to the geography of the state. The law seems to be well settled that when a river is declared to be the boundary between states, although it may change imperceptibly from natural causes, the river as it runs continues to be the boundary. But, if the river should suddenly change its course or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed. *Iowa v. Nebraska*, 143 U. S. 359; *St. Louis v. Rutz*, 136 U. S. 225; *Missouri v. Kentucky*, 11 Wall. 395; *Butterworth v. Bridge Co.*, 123 Ill. 535; *Holbrook v. Moore*, 4 Neb. 437; *Collins v. State*, 3 Tex. App. 324; Gould on Waters, sec. 159.

But the real question is whether the states of Missouri and Nebraska have concurrent jurisdiction over the old bed of the river just as was the case when the river ran there before 1867. The jurisdiction of this state over that part of the river which forms a common boundary of the states is concurrent. It extends not only to the middle of the channel but over the entire channel. Constitution, art. 1, sec. 1; *Swearingen v. Steamboat*, 13 Mo. 519; *Sanders v. Anchor Line*, 97 Mo. 26. But here there is no river, but in its stead is dry land upon which are cultivated fields and pastures. The physical conditions have been changed. Is the case different than if the boundary line between the two states had been located originally on dry land instead in the middle of the channel of the river? We

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think not. The concurrent jurisdiction of the states of Missouri and Nebraska under their enabling acts does not in any case extend beyond their common boundary, except when that boundary is the middle of the channel of the Missouri river. Congress has imposed this limitation upon its existence. It is difficult to see why it exists here any more than if the river had always run where it did after 1867. The reason for the grant of this concurrent jurisdiction, which is so well and forcibly expressed by Judge BARCLAY in 97 Mo., *supra*, lends no support to plaintiff's claim of concurrent jurisdiction in this case. The conditions are wanting which constitute the basis of this jurisdiction. The boundary line between the states is the middle of the former bed of the river, and to this line the jurisdiction of each extends, but the concurrent jurisdiction along there disappeared when the river did.

It is not believed that it was contemplated by congress or the states that the grant of concurrent jurisdiction of the two states on the river authorized the bringing of an action of forcible entry and detainer or of ejectment in this state for the recovery of lands situate anywhere within the territorial limits of Nebraska. We cannot sustain the theory of the plaintiff's instructions which were to that effect. We do not think that the elimination by the court of a part of the plaintiff's fourth instruction was harmful to him, in view of the issues submitted to the jury by other instructions and found adversely to the plaintiff.

The case was fairly submitted to the jury by the instructions of the court. The judgment seems to be for the right party and so will be affirmed. All concur.

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A. L. Houghland, Respondent, v. J. W. Dent *et al.*, Appellants.

Kansas City Court of Appeals, January 2, 1893.

1. **Landlord and Tenant:** ATTACHMENT FOR RENT: PLEADING: ABATEMENT OR BAR. A plea in abatement to an attachment for rent among other things alleged that all the said rent had been fully paid. *Held,* the abatement was waived, and the plea was a plea in bar.

2. ———: ———: PROCEEDINGS: DEFENSES. Proceedings in attachment for rent are the same as in other attachment suits, which suits are excepted out of the rule permitting the setting up by answer as many defenses and counterclaims as one may have.

3. **Practice, Appellate:** ERROR FAVORABLE TO APPELLANT. Appellant cannot complain of errors more favorable to him than to the respondent.

4. **Instructions:** ASSUMING UNCONTROVERTED FACT. It is not error for an instruction to assume a fact which is not controverted nor issuable.

5. ———: PRESENTING NEW ISSUE: GIVEN IN OTHERS. It is not error to refuse an instruction presenting an issue not in the case, or that is given in others.

6. **Landlord and Tenant:** ACCEPTANCE OF RENT: INSTRUCTION NOT HARMFUL. Though rent corn is delivered in a manner different from that provided in the contract, yet if accepted by the landlord it is sufficient; and in this case appellant is *held* not injured by an instruction on this subject.

Appeal from the Adair Circuit Court.—Hon. Andrew Ellison, Judge.

Affirmed.

Joseph Park, for appellants.

(1) No issue should be submitted to the jury about which there is no proof, and plaintiff's first instruction peremptorily requires the jury to find the value of the corn to be forty-five cents per bushel, when there is not a word of testimony on which to base it. *White v. Chaney,* 20 Mo. App. 389; *Raysdon v. Trumbo,* 52 Mo.

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35; *Budd v. Hoffheimer*, 52 Mo. 297; *Givens v. Van Studdiford*, 4 Mo. App. 499. (2) Instruction number 4 presents a hypothesis of the case not warranted by either the pleadings or evidence bearing upon the issue, and is erroneous. *Bank v. Overall*, 16 Mo. App. 510; *Skyles v. Bollman*, 85 Mo. 35. (3) The written contract made plaintiff and defendants croppers on the shares, as to the corn (*Kamerick v. Castleman*, 23 Mo. App. 481), and the defendants were to divide the crop as stated in the lease, and the evidence shows they did. If plaintiff's evidence tended to prove anything it was for unliquidated damages for failure to divide and gather the crop. The landlord and tenant act by attachment, section 9385, Revised Statutes, makes proceedings same as general attachment law. The plaintiff's evidence tended to show a tortious conversion by the defendants, if it tended to show anything. The petition stated a cause in *assumpsit*. Defendants' demurrer to the evidence should have been sustained. *Finlay v. Bryson*, 84 Mo. 664. (4) Action by attachment cannot be sustained for wrongful conversion. *McDonald & Rew v. Forsyth*, 13 Mo. 549; *Riley v. Milling Co.*, 44 Mo. App. 519.

Dysart & Mitchell, for respondent.

(1) There is no error in plaintiff's instructions. Instruction number 1 was given by the court on its own motion upon defendants' statement to the jury, and during the trial of the cause, that the plea of payment was their only plea. The price of the corn was then like undisputed testimony. *Fields v. Railroad*, 80 Mo. 203; *Barr v. Armstrong*, 56 Mo. 577; *Caldwell v. Stephens*, 57 Mo. 589. The defendants in this court for the first time except to price of corn, and ought not now to be heard. (2) The object of section 6384,

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Revised Statutes, 1889, was to prevent tenants from doing what defendants in this case did, viz.: To prevent tenants from removing and selling the crop grown on the premises before the rent is settled. *Kleun v. Vinyard*, 38 Mo. 447; *Chamberlain v. Heard*, 22 Mo. App. 416; *Garroutte v. White*, 92 Mo. 237; *Haseltine v. Ausherman*, 87 Mo. 410. (3) Defendants' refused instructions numbers 1 and 2 ought to have been refused, even if they were correct declarations of law, for they were not predicated upon any issue in the pleadings. *Harbison v. Sanford*, 90 Mo. 477; *Vanhooser v. Berghoff*, 90 Mo. 487; *Hardy v. Railroad*, 95 Mo. 368. No fraudulent conversion, nor trick, nor fraud, nor deception was charged in the petition or affidavit, but the charges were such as are found in section 6384, Revised Statutes, 1889. (4) And the defendants have no ground of complaint for the court's refusal to give their instruction number 3, and the court's giving of instruction number 4; for the two instructions number 3 and number 4 are almost identical in words and express the same law. *Smith v. Eno*, 15 Mo. App. 576; *Martin v. Smylee*, 55 Mo. 577; *Whetston v. Shaw*, 70 Mo. 575; *Nugent v. Curran*, 77 Mo. 323. (5) The defendants in their plea in abatement plead payment. They waived their plea in abatement by pleading to the merits. *Harty v. Sherman*, 13 Mo. 548; *Green v. Craig*, 47 Mo. 92; *Haseltine v. Ausherman*, 29 Mo. App. 451. Defendants' evidence accords with their plea. They admit the ground of attachment if any rent was due.

SMITH, P. J.—This was an action brought before a justice of the peace by the plaintiff against the defendants, by attachment under the landlord and tenant statute, to recover rent.

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The defendants filed what was denominated by them a plea in abatement, in which there was a traverse of the allegations contained in the affidavit for the attachment supplemented with the affirmative allegation, "that all the said rent has been fully paid and settled between the plaintiff and defendants." A case is, therefore, presented where a plea in bar is set up in the plea in abatement. The effect of this was to waive the plea in abatement. *Cannon v. McManus*, 17 Mo. 345; *Burgoin v. Wheaton*, 30 Mo. 215; *Fugate v. Glasscock*, 7 Mo. 577; *Hartry v. Shuman*, 13 Mo. 547.

Proceedings on all attachments under the landlord and tenant statute are required to be the same as provided by law in cases of suits by attachment. Revised Statutes, sec. 6385. Proceedings by attachment are excepted out of the operation of the rule of practice provided by statute in other civil cases to the effect that "a defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as had been heretofore denominated legal or equitable or both." *Little v. Harrington*, 71 Mo. 390, overruling *Rippstein v. Ins. Co.*, 57 Mo. 86; *Fordyce v. Hathorn*, 57 Mo. 120. Upon the pleadings thus framed the matter pleaded in abatement was waived, and, hence, tendered no issue for trial in the case. The plea to the merits tendered the only issue left in the case, which was whether the rent alleged by the plaintiff's statement to be due "had been fully paid and settled between plaintiff and defendants."

The evidence, it is true, took a much wider range than it should have under the issues, but, since this was an error more favorable to the defendants than the plaintiff, the former have no right to complain of that. The instructions for the plaintiff and the one given by the court on its own motion for the defendants presented the law of the case in a very favorable light before the

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jury for the defendants. The first instruction for plaintiff, which told the jury, among other things, that if they found for the plaintiff they should find the value of the unpaid rent at the rate of forty-five cents per bushel, did not assume any issuable fact. The price of the corn was by the plea to the merits impliedly admitted. It is not error for an instruction to assume a fact which is not controverted nor issuable. *Semple v. Crouch*, 8 Mo. App. 593.

And as to the action of the court in refusing the defendants' first and second instructions, it is sufficient to say there was no issue of fraud in the case, and, therefore, these instructions were properly refused.

And as to defendants' third instruction, no more need be said of it than that the court upon its own motion gave one in its place which is nearly word for word like it.

The defendants contend that the plaintiff received three loads of corn in excess of the three hundred and ninety-three bushels delivered to him in the crib. We do not so understand the evidence. Nor do we understand that the plaintiff's fourth instruction authorized a finding against defendants for this corn received by plaintiff though not delivered to him in the crib as required by the contract. The three loads were delivered under the contract though not in the manner required by it. The delivery of this quantity of the rent corn was made in a manner different from that provided in the contract, but, as such a delivery was accepted by the plaintiff, it was sufficient for all purposes. A consideration of the evidence in connection with the instruction convinces us that no injury resulted to the defendants by the giving of such instruction.

The action was one plainly for rent payable in corn which was due and unpaid. There was no question of

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tortious conversion in the case as the defendants seem to suppose. The case is not analogous to *Finlay v. Bryson*, 84 Mo. 644, nor to *Riley v. Milling Co.*, 44 Mo. App. 519. And for reasons already sufficiently appearing it is made quite manifest that under the pleadings no such question could arise. The judgment is for the right party, and should be affirmed. All concur.

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JULIA A. BECK, Respondent, v. JAMES WISELY, Defendant; C. P. SEITZ, Interpleader and Appellant.

Kansas City Court of Appeals, January 2, 1893.

Landlord and Tenant: ATTACHMENT FOR RENT: LIEN ON CROPS: EVIDENCE. To entitle the landlord to a lien on the crops it is incumbent on him to show affirmatively that the tenant who grew the crop was indebted to him for rent for that year, and that such rent, if past due, was due and payable within eight months next preceding the attachment.

Appeal from the Vernon Circuit Court.—HON. D. P. STRATTON, Judge.

REVERSED AND REMANDED.

C. T. Davis and *January & Lindley*, for appellant.

(1) The defense of lien must be specially pleaded. 7 Wait's Actions & Defenses, sec. 5, p. 222. (2) A landlord has no lien on the crop grown on the demised premises unless it be shown that rent was reserved and payable, and was due within eight months preceding the attachment. Revised Statutes, 1889, sec. 6376. (3) It was not shown by defendant when the farm was rented to Wisely, or when the rent, if any, became

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due, and that it was unpaid. (4) The evidence offered wholly failed to establish a lien, and the court erred in not giving interpleader's instruction.

No brief for respondent.

GILL, J.—Mrs. Beck sued Wisely for rent, and attached certain corn alleged to have been grown on the premises. Seitz filed his interplea, claiming the corn under a purchase. The plaintiff's answer to the interplea was a general denial. The issues were tried by the court without a jury; findings and judgment for the plaintiff, and the interpleader appealed.

Under the testimony as shown by the record here presented, the judgment of the trial court was for the wrong party, and will be reversed. The undisputed evidence shows that the interpleader purchased the corn in question from one Mulkey (who bought same from Wisely, the tenant), and paid therefor $400, and that he, the interpleader, was in possession gathering the corn when the sheriff seized it. This clothed the interpleader with an apparent title, good as against the plaintiff or other persons until she or they should show some superior right or lien in themselves. Presumably now the plaintiff claimed on an alleged landlord's lien, as a crop grown on the leased premises; but she failed entirely to prove such facts as would establish any such lien.

Section 6376, Revised Statutes, 1889, must be relied on to sustain plaintiff's lien, and it provides that "every landlord shall have a lien upon the crops grown on the demised premises in any year for the rent that shall accrue for such year, and such lien shall continue for eight months after such rent shall become due and payable, and no longer." To entitle her to such landlord's lien it was then incumbent on

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the plaintiff to show affirmatively that the tenant who grew the corn was indebted to her (or would be liable to her) in some amount on account of rent of that year, and that the rent, if past due, was due and payable within the eight months next preceding the attachment. The plaintiff failed to prove these necessary facts.

The judgment must be reversed, and the cause remanded. All concur.

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THE MOUNT VERNON BANK, Appellant, v. JOHN D. PORTER *et al.*, Respondents.

Kansas City Court of Appeals, January 2, 1893.

1. **Banks and Banking:** CASHIER ESTOPPED: PROFITS: EVIDENCE. Where the cashier of a bank transacts business officially for the bank and at its instigation, he is estopped from denying his agency, and the profit on such transaction belongs to the bank and not to the cashier, and in an action to recover such profits the whole transaction is admissible in evidence.

2. ———: ———: ULTRA VIRES: NEGOTIATION OF BONDS. If it were *ultra vires* for the bank to negotiate water bonds, such transaction is not *malum in se*, can only be taken advantage of by the state, and the cashier through whom the contract was made cannot set it up to retain for himself the profits of the transaction.

3. ———: CASHIER'S TIME: CORPORATE BUSINESS. If the contract was with the bank and the business was for the bank, in order for it to recover the profits of the cashier, it would not seem necessary to show he was to devote his whole attention to the bank and do no other business.

4. **Principal and Surety:** CASHIER'S EMPLOYMENT: EVIDENCE. The sureties of a cashier ought not to be held for an act of his not done for the bank as cashier, but the terms and conditions of his employment may be shown though they are not set out in the books of the directory.

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5. **Banks and Banking**: POWER TO NEGOTIATE BONDS: PRINCIPAL AND SURETY. Under the statutory charter of Missouri state banks, they are authorized to handle negotiable bonds and can sell or place them for their customers, and the sureties of a cashier would be liable for his misappropriation of the profits of such transaction.

Appeal from the Dade Circuit Court.—HON. D. P. STRATTON, Judge.

REVERSED AND REMANDED.

THE following is the section of the statutes of 1865 concerning the powers of savings banks: Chapter 68, section 1. "Any five or more persons in any county in this state may organize themselves into a savings association, and shall be permitted to carry on the business of receiving money on deposit and to allow interest thereon, giving to the person depositing credit therefor, and of buying and selling exchange, gold, silver, coin bullion, uncurrent money, bonds of the United States, of the state of Missouri, and of the city and county in which any association shall be organized; of loaning money on real-estate and personal security, at a rate of interest not to exceed ten per cent. per annum, and of discounting negotiable notes, and notes not negotiable; and on all loans made may keep and receive the interest in advance." And the following is that of 1889: Chapter 42, section 2745. "Every such corporation shall be authorized and empowered to conduct the business of receiving money on deposit and allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral and personal securities, at a rate of interest not exceeding that allowed by law, and also of buying, selling and discounting negotiable and non-negotiable paper of all kinds, as well as all

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kinds of commercial paper; and, for all loans and discounts made, such corporation may receive and retain in advance the interest thereon."

Norman Gibbs and *Henry Brumback*, for appellant.

(1) "Where profits are made in the ordinary course of the business of the agency, it must be presumed that the parties intended that the principal should have the benefit thereof." Story on Agency [7 Ed.] secs. 207, 211, 214; 1 Parsons on Contracts [5 Ed.] p. 86, *et seq.* "Where one is actively or constructively the agent of another, all profits made by him in the business of the agency, beyond his ordinary compensation therein, belong to the employer." *Murdoch v. Milner*, 84 Mo. 96; *Ehrlich v. Ins. Co.*, 88 Mo. 256; *Bent v. Priest*, 86 Mo. 482; *Dutten v. Willner*, 52 N. Y. 318, 319; *Bain v. Brown*, 56 N. Y. 285. (2) The negotiation of these bonds was within the scope of the legitimate powers of the bank, and not, as contended by respondents and held by the circuit court, *ultra vires*. Revised Statutes, sec. 2745, p. 700. This language seems broad enough to give the needful authority, and must be decisive, unless modified by other provisions.

Mann & Talbutt for respondents.

(1) The court properly refused to admit parol evidence as to the contract between the appellant bank and John D. Porter, the cashier. When respondents were solicited to become surety for Porter as cashier, they would naturally look to the record of his appointment and the recitals in their bond, and they cannot be held by implication beyond these recitals. *Blair v. Ins. Co.*, 10 Mo. 560–564; *Nolley v. Callaway Co.*, 11 Mo. 460–463; *State v. Sandusky*, 46 Mo. 377; *State v. Kingsley*,

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44 Mo. 262; *Miller v. Stewart*, 9 Wheat. 702. (2) Respondents bound themselves for the honest and faithful performance by Porter of his duties "as cashier." The law of the land regulating his duties is a part of their contract. It is not a part of his duties as cashier of the bank to negotiate the sale of water bonds in controversy, and the court properly rejected all evidence offered in relation to said transaction. *Blair v. Ins. Co.*, 10 Mo. 560; *Nolley v. Callaway Co.*, 11 Mo. 463; *City of St. Louis v. Sickles*, 52 Mo. 126; *Wright v. Russell*, 2 Black. 934; Story on Contracts, 353; *Bank v. Chickering*, 4 Pick. 414; *Orrick v. Vahey*, 49 Mo. 428. (3) It is not among the ordinary duties of a cashier to act as an agent or "promoter" or broker for the sale of bonds on commission for other parties. *Winsor v. Bank*, 18 Mo. App. 665; Morse on Banks & Banking, 152. That this transaction is outside the scope of his duties as cashier has been flatly decided. *United States v. Bank*, 21 How. 360; *Winsor v. Bank*, 18 Mo. App. 673.

Ellison, J.—Plaintiff is a banking corporation, organized under the laws of Missouri. Defendant, John D. Porter, was plaintiff's cashier in the year 1888, and the other defendants are his bondsmen as such cashier. In the year 1888, as plaintiff alleges and offered to prove, Porter as such cashier, or the bank through Porter, as cashier, negotiated $25,000 of bonds, known as the Pierce City waterworks bonds, for which there was a commission of $1,000 due the bank; that this sum was paid to Porter, cashier, but he refused to account to the bank for the money. At the trial plaintiff offered to prove the foregoing and much more in the line of showing that, whatever agency Porter exercised in transacting the business, it was in his official capacity; that that portion of the negotiation

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which emanated from him was in his capacity as a representative of the bank, and that all that portion of the negotiation from the purchasers of the bonds (or their agents) was addressed to him in his official capacity, and that his expenses in the negotiation were paid by the bank; that the bank had rendered financial assistance to the builders of the waterworks company, with the understanding that such company would place their bonds with them to sell or negotiate, and that the company did so place the bonds with them. All of the above was excluded by the trial court, whereupon the plaintiff took a nonsuit with leave to set it aside. Failing in which it appeals.

Our opinion is that all the foregoing testimony should have been admitted. It seems to have been excluded on the ground that it was outside of defendant's duties as cashier. But, without answering yea or nay to this position for the present, we will say, that he did it for the bank officially and at the bank's instigation. He ought now to be estopped from denying his agency. Herman on Estoppel, sec. 1090. In short the bank did it through him, and it does not now lie in his mouth to say it was beyond his duties. If the matters offered to be proved are believed to be true defendant is unquestionably liable. The money belongs to the bank, and he must account for it. If he does not he must answer.

The trial court, as seems to be indicated in the briefs, perhaps excluded the testimony also upon the ground that the act of the bank in negotiating the bonds was *ultra vires*. But this cannot be allowed to be set up by the defendant cashier. The contract of the bank (through its officer) to sell the bonds was not *malum in se*, and, if it be conceded that it overstepped its chartered powers in so doing, it was a transgression for which it is answerable to the state alone. This ques-

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tion we fully considered in the case of *Welch v. Brewing Co.*, 47 Mo. App. 608, 618. The transaction was not *malum in se*, and the contract between the bank and the owners of the bonds has been fully executed, and we can discover no reason why the doctrine of *ultra vires* should shield defendant. 2 Morse on Banks & Banking, secs. 731, 734, 750.

If the matters above referred to are shown to be facts, we hardly see the necessity of plaintiff proving that it was understood that defendant should devote his whole attention to the affairs of the bank, and do no other business. But of course we cannot say what phase may be put upon the case by defendant's testimony as none was heard. We will add this, that if the evidence offered by plaintiff should on retrial be relevant to the case as it may disclose itself by the pleadings and evidence, it would be admissible as against the defendant cashier, though perhaps not against the sureties, as they ought not to be held under their bond for any act of defendant not done for the bank, or in his capacity as cashier. We are not willing to say that because the terms and conditions of defendant's employment as cashier were not set out in the books of the bank directory that such terms cannot be shown.

Coming now to consider the relation of the surety defendants to this case we need not decide whether the sureties on a banking officer's bond are liable for those acts he may do for the bank, by its direction, which acts are *ultra vires*. Since, in our opinion, the proof offered here, showing the arrangement made by the bank when it gave the financial assistance and agreed to negotiate the bonds, was within the proper powers of the bank. Especially is this true under the broad terms of the charter of such institutions in this state. Revised Statutes, 1889, sec. 2745. It must be understood that the ordinary terms, to become a bank, or do

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a banking business, are not as comprehensive as our statutory charter. The charter does not stop at stating that a certain number of persons may establish "a bank of deposit and discount," as is sometimes the case; and in which case it would become important to inquire into the rights and powers inherent in such business. But here, since we have a statutory charter authorizing banking corporations, we must look to the statute for the powers of the bank. "Corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself." *Bank v. Dandridge*, 12 Wheat. 68. Our statute, by the section aforesaid, not only authorizes such institutions to loan money and receive it on deposit; to buy and sell, exchange and coin; to negotiate and discount negotiable and non-negotiable paper; but it gives authority to *buy and sell* such paper, "*as well as all kinds of commercial paper.*" Now this we think was sufficient authority for the bank to make the arrangement it is said to have made concerning the sale of the waterworks bonds. The bank itself could have bought them outright; and I can see no reason why a sale or placing of them for its customers is not covered by the breadth of the statute referred to. A town warrant is held to be a species of commercial paper which a bank may buy (*Aull Savings Bank v. City of Lexington*, 74 Mo. 104), and so is a county warrant (*International Bank v. Franklin Co.*, 65 Mo. 105), and this under a statute narrower than its present reading. Corporate bonds have of recent years grown to become a large part of our commercial securities, and I am satisfied that by the provision of the statute our state banks are authorized to handle them. Section 1, page 365, Revised Statutes, 1865, authorized the purchase and sale of bonds of the United States, the state of Missouri, and of the city or county in which the banks

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were organized, and to discount only negotiable and non-negotiable notes. Under the present statute, as before stated, such limitations are omitted, and the broad terms above noted are inserted.

A wrong theory has governed the trial of the cause. It has been placed with a class of cases to which it does not belong. The judgment is reversed and the cause remanded. All concur.

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AARON KRATZ, Appellant, v. JOHN S. PRESTON, Respondent.

Kansas City Court of Appeals, January 2, 1893.

Judgments: LIMITATIONS: REVIVOR: SCIRE FACIAS: DEFENSE. Plaintiff obtained judgment against defendant, in 1861, on personal service, in the state of Pennsylvania, which was revived in 1891 on a writ, and an *alias* writ of *scire facias*, with return of *nihil* to each. *Held:*—

(1) The limitation began to run from the date of the revival instead of the original judgment.

(2) The proceeding by *sire facias* is a further proceeding in the same action, and is based on the original judgment, and not a new action.

(3) That at common law two returns of *nihil* were sufficient to warn the defendant.

(4) That the proceedings in Pennsylvania to revive the judgment being regular under the common law, which is presumed to be in force there, will support the revival so as to form a new period of limitation and support an action in this state, notwithstanding a want of personal service.

(5) That the defendant, in a suit on said revived judgment, since it is without personal service, may show in defense anything (except limitation) going to discharge him from the original judgment occurring since its rendition.

Appeal from the Barton Circuit Court.—HON. D. P. STRATTON, Judge.

REVERSED AND REMANDED.

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McCluer & Bowling, for appellant.

(1) See *Walsh v. Bossee*, 16 Mo. App. 231, which holds that "a judgment in *scire facias* to revive a judgment operates to avoid the statute of limitations, which then runs from its date, and not from that of the original judgment." Foster on Scire Facias, p. 30; *Farren v. Beresford*, 10 Cl. & Fin. 702. (2) A clear distinction is made in the books between an action and a *scire facias*. *Scire facias* is only a continuation of a former suit, and not an original proceeding. *Humphreys v. Lundy*, 37 Mo. App. 320; 1 Chitty on Pleading, 127, 299; *McGill v. Perigo*, 9 J. R. 269; *Coomes v. Moore*, 57 Mo. 338; *Treasurer v. Foster*, 7 Pa. St. 65; Graham's Practice, 661, 663; 8 Bacon's Abridgments, Scire Facias, 598; *Denyre v. Hann*, 13 Iowa, 240. The case of *Eager v. Stover*, 59 Mo. 88, is one in which a Pennsylvania judgment, similar to this one, had been revived after the defendant had left the state, and the revival was held good. *Ellis v. Jones*, 51 Mo. 180; *Marks v. Fore*, 51 Mo. 69. The revival was in exact compliance with the common law. Freeman on Executions, sec. 89; *State v. Peyton*, 32 Mo. App. 522. Pennsylvania having once been under the laws of England, in the absence of proof, the common law will be presumed to prevail there. *White v. Chaney*, 20 Mo. App. 389.

Robert T. Stickney, for respondent.

Ellison, J.—This action is based on a judgment obtained by plaintiff against defendant in the state of Pennsylvania on the twenty-sixth of July, 1861, and which was revived in that state on the eleventh of February, 1891. The transcript of the judgment and revivor was excluded by the circuit court. Judgment being given for the defendant, plaintiff appealed.

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The original judgment was rendered on the personal appearance of the defendant. The subsequent revivor on *scire facias* was had after defendant had removed to this state, and was obtained by issuing a *scire facias* and an *alias* with a return *nihil* to each. From the briefs of the counsel we take it that the trial court excluded the transcript under the statute of limitations, the judgment being more than twenty years old. If the period of limitations, as applied to this cause, is to be counted from the day the original judgment was entered in Pennsylvania, then it is barred, since it was more than twenty years prior to the commencement of this action. Revised Statutes, 1889, sec. 6796. But, if the date of limitation is to begin at the revival of such judgment, then the statute had not run. *Walsh v. Bossee*, 16 Mo. App. 231. That case decides that a *scire facias* is a proceeding in the nature of an action, and the judgment of revivor is a renewal of its life, creating *new rights* for a new period of limitation. The reasoning and conclusion of the opinion in that case is so satisfactory to us that we need do no more than cite and adopt it. That case and the numerous authorities therein discussed use, as the base for the conclusions reached, the fact that the revival creates new rights in the plaintiff.

But the further question is presented in this case, whether the revival of this judgment was not void in the courts of this state, since it was not had on personal service, the proceedings therefor being commenced long after the defendant had removed from Pennsylvania to Missouri. It was, perhaps, this question which influenced the trial court to the rulings of which complaint is made. If such was the view of the trial court, it is sustained by a paragraph in 2 Black on Judgments, section 892, based on the case of *Kay v. Walter*, 28 Kan. 111, wherein it is decided that a

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judgment of revival without jurisdiction over the person of defendant, by service of process or appearance, is a nullity outside of the jurisdiction of the state authorizing such proceeding. That in that case, since the defendant was a *bona fide* resident of Kansas, and in that state when the proceedings to revive were begun, and did not authorize his appearance to be entered, the judgment was a nullity as to defendant in the courts of Kansas.

It is undoubtedly true that to give a court jurisdiction, which will be regarded in courts outside of the territory of the state where such court is located, there must be process served upon the defendant within the limits of such jurisdiction, or some property must be found within such limits against which such court may proceed *in rem*. *Latimer v. Railroad*, 43 Mo. 105. It is also, likewise, true that, though the record of the foreign judgment should show jurisdiction over the person, in this respect, the record may be disputed. *Marks v. Fore*, 51 Mo. 69. But those cases and others following them involve judgments as originally rendered. The question before us now is not the same. Here there was jurisdiction over the person of defendant when the original judgment was rendered. Is it necessary in such case that there should be a new jurisdiction of the defendant's person at the time the judgment was revived? It seems to me proper to ascertain the nature of a judgment of revivor in order to properly dispose of this question satisfactorily. It is obtained by a *scire facias*, which is a judicial writ, the use of which the statute has authorized to keep in force and effect a judgment already rendered. It is said to be a statutory substitute for the common-law action on the judgment which was formerly necessary to be brought if execution be not issued within a year and a day. *O'Brien v. Ram*, 3 Mod. 189. I can find no case of

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revivor where it is distinctly said to be a new action. It is said to be in the *nature* of an action, for pleas may be made to it (*Walsh v. Bossee, supra*), and on a proper issue a jury may be had. *Simpson v. Watson*, 15 Mo. App. 425. It is chiefly from the fact that the defendant may plead to it that it derives its likeness to an ordinary action. But what may he plead? Only those things which go to his discharge since the rendition of the original judgment. He cannot otherwise alter the original. The validity of the debt, his liability, and those other matters which he might have pleaded to the original action are closed to him on *scire facias*. But, if he has paid the judgment, or has been discharged, he may show this on plea to the writ. Bacon says: "And though it be held that a *scire facias* is in nature of an original, yet it hath been adjudged that no writ of error lies into the exchequer chamber on a judgment given in *bancus regis* on a *scire facias*, the statute, 27 Elizabeth, c. 8, which gives the writ of error, mentioning only suits or actions of debt, detinue, covenant, account, actions upon the case, *ejectione firmæ* or trespass." 8 Bacon's Abridgments, 599. Neither could the plaintiff have costs except by aid of the statute. 8 Bacon's Abridgments, 599. The writ is for some purposes but the continuance of the original. 8 Bacon's Abridgments, 588. This is peculiarly so when its object is to revive a judgment. In *Wright v. Nutt*, 1 Term. R, ASHHURST, J., in speaking of the revival of a judgment, said: "This is not a *new action*, but a *continuation of the old one*; it is only a *scire facias* to revive the former judgment." See also *Denegree v. Hann*, 13 Iowa, 240; *Coomes v. Moore*, 57 Mo. 338; *Humphreys v. Lundy*, 37 Mo. 320. See also *Edgar v. Stover*, 59 Mo. 87, where the revival of a judgment under circumstances similar to the case at bar was, by acquiescence at least, deemed valid. The

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judgment sued on in that case was held bad for lack of jurisdiction in the original judgment. *Such object* being different from many of those purposes for which the writ is used, in effect and practice, as an original action. Where the object is to revive a judgment it cannot be said to be a new suit; it is a continuance of the old action, "and merely ancillary thereto" (*Ellis v. Jones*, 51 Mo. 180), notwithstanding it partakes of the nature of a new action, as before stated, in that it may be pleaded to. I think it apparent that when the writ is used to revive a judgment it is merely a further proceeding in the same action, *and is based on the original judgment*, which in this case we have seen was rendered on defendant's personal appearance. Such writ is sometimes called a writ of execution. 2 Tidd's Practice; *Barrow v. Bailey*, 5 Fla. 9. It is said in *Phillips v. Brown*, 6 Term. R. 282, to be merely a step towards execution on the original demand. And so we know that to be its end and use in practice. We, therefore, feel constrained to decline following the case in 26 Kan. The jurisdiction of the person in the original action was sufficient to sustain the after proceedings in *revivor;* provided such after proceedings were regular in themselves.

That they were regular in all particulars is clear. A writ of *scire facias* was issued, and a return *nihil* was made by the sheriff. An *alias* writ was then in due course issued, and another return *nihil* made. This, under the common law, was equal to a return of *scire feci*, that defendant had been warned. *Barrow v. Bailey*, 5 Fla. 9, and English and American authorities therein cited; 2 Tidd's Practice; 1 Freeman on Executions, sec. 89, and authorities cited in support of text. We will presume the common law to be in force in Pennsylvania, and, therefore, that the proceedings to revive the judgment were proper.

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But while two returns of *nihil* will amount to a notification to defendant and sustain a judgment of revival, yet, in point of fact the defendant by such proceeding has not been personally notified. And from this there follows, as a consequence, a right or privilege in the defendant which he would not have, had he been personally served with notice. That right is to have an *audita querela*, or, in this modern day, a motion, whereby he will be allowed to show after judgment of revival those things in his defense against an execution which he might have made at the hearing of the *scire facias* had he been personally served with notice. In other words, notwithstanding that two *nihils* amount to a *scire facias* and will support the revival, the defendant's defense of his discharge from, or of, the original judgment will remain open to him. Authorities, *supra; Wood v. Ellis*, 10 Mo. 382.

Our conclusions as to this case on the record are these: That the statute of limitations began to run from the date of revival instead of the original judgment; that the proceedings in Pennsylvania to revive the judgment being regular under the common law will support the revival so as to form a new period of limitation and support an action in this state, notwithstanding there was no personal service on defendant in Pennsylvania in the revival proceedings; that defendant may now show anything (except the statute of limitations) going to discharge him from the original judgment occurring since its rendition.

The judgment will be reversed and the cause remanded. All concur.

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THE STATE OF MISSOURI *ex rel.* JOHN DRACH, Public Administrator, etc., Respondent, v. THOMAS CHEANEY *et al.*, Appellants.

Kansas City Court of Appeals, January 2, 1893.

Principal and Surety: OFFICIAL BOND: ADDITION OF NEW OFFICE. C. qualified and gave bond as public administrator in January, 1885. In March thereafter the legislature created the office of public guardian and curator, and imposed its duties on the public administrator. *Held,* his sureties must be held for his default in so far as concerns his maladministration of his duties of public administrator, properly so called, but they cannot be held on account of any default in the performance of the duties pertaining to the office of public guardian and curator.

Appeal from the Henry Circuit Court.—HON. JAMES H. LAY, Judge.

AFFIRMED.

Calvird & Lewis, for appellant.

The act of the general assembly (Session Acts, 1885, page 28) enlarged the powers, duties and obligations of Thomas A. Cheaney as public administrator of Henry county; and said act being passed subsequent to the execution of the bond herein sued on these sureties become released. *State ex rel. v. Roberts*, 68 Mo. 234; *McCurdy v. Brown & Gibson*, 8 Mo. 551; *Blair v. Ins. Co.*, 10 Mo. 566; *Brown v. Sneed*, 77 Tex. 471; *Mumford v. Railroad*, 2 B. J. Lea (Tenn.) 393; *Sage v. Strong*, 40 Wis. 575; *City of Harrisonville v. Porter*, 76 Mo. 358; *Ex parte James*, 59 Mo. 280. A surety is a favorite in law, and is not chargeable beyond the strict terms of his engagement. 1 Brandt on Suretyship

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& Guaranty [2 Ed.] sec. 93; *Bauer v. Cabanne*, 105 Mo. 110; *State ex rel. v. Kurtzeborn*, 78 Mo. 98; *Bank v. Hunt*, 72 Mo. 597; *State ex rel. v. Dailey*, 4 Mo. App. 172; *Cranor v. Reardon*, 39 Mo. App. 306; *Bank v. Traube*, 75 Mo. 199.

C. C. Dickinson and *J. D. Lindsay*, for respondent.

It is not sought in this action to hold Cheaney's sureties liable for any default on his part as to any of the new duties imposed upon him; and the fact that the legislative act of 1885 made him *ex-officio* public guardian and curator, and cast upon him the new duty of the charge of the estates of minors in certain cases, does not affect the liability of his sureties for defaults by him as to his old duties; for his duties, as to the estates of deceased persons, were not changed by the act referred to. *Gaussen v. United States*, 97 U. S. 584; *Bank v. Traube*, 75 Mo. 199; *McCartney v. United States*, 10 Cent. Law Jour. (Mass.) 113; *People v. Vilas*, 36 N. Y. 459; 93 Am. Dec. 520; *Strawbridge v. Railroad*, 14 Md. 360; 74 Am. Dec. 541; *White v. Fox*, 22 Me. 341; *Marney v. State*, 13 Mo. 7; *Dawson v. State*, 38 Oh. St. 1; *Mayor v. Kelly*, 98 N. Y. 467; 9 Am. & Eng. Corp. Cases, p. 303, and note; *Bank v. Elwood*, 21 N. Y. 88; *King v. Nichols*, 16 Oh. St. 80; *Board of Supervisors v. Clark*, 92 N. Y. 391; 2 Am. & Eng. Corp. Cases, p. 405; *Bank v. Zeigler*, Mich. S. C.; 1 Am. & Eng. Corp. Cases, p. 332; *Orman v. City of Pueblo*, 7 Am. & Eng. Corp. Cases (Col.) p. 140, and note; *Lionberger v. Krieger*, 88 Mo. 160; 2 American & English Encyclopedia of Law, 466.

Gill, J.—In January, 1885, defendant Cheaney qualified as public administrator of Henry county—an office to which he was chosen at the preceding fall

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election. The other defendants were sureties on his official bond. The plaintiff Drach succeeded Cheaney as public administrator in January, 1889. This suit was brought on Cheaney's official bond to recover a sum of money for which he failed to account in the administration of the estate of a deceased person, and which he had charge of during his term of office. The sureties defend on the alleged ground that the legislature in 1885, and after the execution of the bond sued on, made the public administrator *ex-officio public guardian and curator*, and thereby added to the office the care and charge of the estates of minors in addition to those of deceased persons, and that the sureties were thereby released. At the time the bond was executed (January, 1885) the duties of the public administrator were confined to the care and control of the estates of deceased persons. Subsequently (in March, 1885) the office of public guardian and curator was created by the legislature, and the duties thereof were imposed on the public administrator. Acts, 1885, p. 27.

The matter for decision here is, whether the addition of such new duties to the position then held by Cheaney should discharge these defendants as sureties on his bond. The trial court held the point against the defendants, and they have appealed.

After a careful consideration of the great number and bewildering variety of adjudicated cases on this subject—those cited by industrious counsel and others found in the books—we are convinced of the correctness of the ruling of the lower court, and shall affirm its judgment.

Omitting for the present any reference to decided cases in Missouri (which we must say are in some confusion), and we find it announced by a number of the best courts in the land, that duties imposed upon an officer, different in their nature from those which he

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was required to perform at the time his official bond was executed, do not render it void as an undertaking for the faithful performance of those duties which he at first assumed. The bond will still remain a binding obligation for what it was originally given to secure. *Gaussen v. United States*, 97 U. S. 584; *Board of Supervisors v. Clark*, 92 N. Y. 391; *Mayor, etc., v. Kelly*, 98 N. Y. 467; cases cited in note in 9 Am. & Eng. Corp. Cases, 309, 310; *Skillett v. Fletcher*, 2 Eng. Law Reports, C. P., p. 469.

The English case last cited we find approved in *Home Savings Bank v. Traube*, 75 Mo. 199. In this *Skillett case*, the point was this: A was appointed to the office known as collector of sewer rates, and for the faithful performance of the duties gave the bond in suit. Subsequently the office of collector of main drainage rates was created by act of parliament, and the duties thereof imposed on the office held by A; and the defense there, as here, was, that this imposition of new and additional duties on the officer had the effect to discharge the sureties on his official bond given for the faithful performance of the original duties. The English court held otherwise and decided that, though the bond covering the duties of the original office would not apply to the officer's conduct as to the new duties, yet because thereof the bond did not become void as to the duties first imposed, and the sureties continued liable therefor.

These and other authorities that might be referred to hold, "that the sureties are not discharged by the imposition of new duties which are distinct and separable from those protected by the guaranty, unless such new employment renders impossible or materially hinders or impedes the proper and just performance of the duties guaranteed. Where the new employment is separate and distinct, and in no respect essentially

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interferes with the duty covered by the bond, the imposition of such added duties is wholly a matter between the employer and employe, with which the sureties have no concern. For misconduct as to the new employment the bondsmen are in no manner responsible, and they have no right to complain so long as the added and separable duties do not prevent the proper performance of those guaranteed." *Mayor v. Kelley*, *supra*.

The case of *Home Savings Bank v. Traube*, 75 Mo. 199, is quite in point. There the plaintiff bank sued defendants as sureties on the bond of Rodel, employed in the first instance as bookkeeper, and the bond was made to secure faithful performance as bookkeeper.

After Rodel entered the bank, and after the bond was made, the bank required him to perform the additional duties of teller. Rodel's misconduct was in the capacity of both bookkeeper and teller. It was contended in that case, as here, that the addition of new duties without their consent worked a discharge of the sureties on the bookkeeper's bond. The court, however, held the sureties liable for Rodel's misconduct as bookkeeper. In the opinion this language appears: "If the bank, by requiring new and additional duties of Rodel, or by any other action on its part, prevented the proper discharge of his duties as bookkeeper, we do not think the sureties would be bound for any dereliction or default thus occasioned. * * * It is clear that the sureties could not be held for any defalcations of Rodel as teller. * * * Where the omission of Rodel to perform his duty as bookkeeper is wholly disconnected from any improper act on his part as teller, and was not superinduced by his appointment as teller, we do not see why the sureties should not be held liable therefor."

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In this and all such cases the courts recognize the time-honored doctrine that the liability of the surety is *strictissimi juris*, and that his responsibility will not be extended beyond the plain terms of his engagement. His obligation is not in the least extended by these decisions. He is only held for the proper performance of the duties guaranteed, nothing more.

Applying now the law, as thus understood, to the case here, and it seems clear that these defendants, sureties on Cheaney's bond, as public administrator, must be held for his default in so far as concerns his maladministration of the duties of *public administrator*, properly so called, and that they cannot be held on account of any default in the performance of the duties pertaining to the office of *public guardian* and *curator*, which were created and imposed on Cheaney after these sureties signed the bond. It was the purpose of this action to reach the first only. Defendants were not called on to make good any default in the new duties or additional office which had been assumed or imposed on their principal.

The judgment is affirmed. All concur.

HUNT & BOOTH, Plaintiffs in Error, v. HENRY HUNTER, Defendant in Error. 52 263 / 77 414

Kansas City Court of Appeals, January 2, 1893.

1. **Practice, Appellate:** TRIAL BEFORE COURT: INSTRUCTION. In trials by the court without a jury, the appellate court will not give that critical examination of instructions it otherwise would, since in such case the office of instructions is to merely show the theory of the court, and, if the instructions read together show that the court's view of the law was correct, there is no ground of complaint.

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2. **Construction**: LETTERS: OFFER TO CANCEL: ACCEPTANCE: COURT'S DUTY: EVIDENCE. Two letters set out in the opinion are construed to be an offer to cancel an existing contract, and an acceptance of that offer; and *held*, it was the court's duty to construe them, and any explanation of a private intention cannot control their evident meaning.

3. **Evidence**: CUSTOM: RECORD. On the record in this case it was proper to admit evidence of custom in relation to contracts like the one involved.

4. **Practice, Appellate**: OBJECTIONS: EXCEPTIONS. The statement in a brief that certain matters were admitted, or proven, cannot dispense with objections to testimony, and exceptions taken.

Appeal from the Henry Circuit Court.—HON. JAMES H. LAY, Judge.

AFFIRMED.

THIS is an action for damages arising from alleged breaches of certain contracts for the sale and delivery of a lot of oats and corn, sold by defendant to plaintiffs in 1890. At the time of the making of the several contracts sued on and the alleged breaches thereof, and for some time prior thereto, the plaintiffs were copartners engaged in the business of wholesale grain dealers in the city of San Antonio, Texas; and defendant was engaged in the business of buying and selling grain at the city of Clinton, in Missouri.

The petition contains five counts. The first, second and third related to the oats, and the fourth and fifth to the corn.

The first count in the petition charges, in substance, that on the first day of September, 1890, the defendant did agree to sell and deliver to plaintiffs five thousand bushels of number 2 sacked oats, to be thereafter delivered to plaintiffs free on board the railway cars at the city of Clinton, Missouri, or at any other place in Missouri, requiring the same freight rates to

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common points in Texas, within a reasonable time from the date of said agreement; that plaintiffs were then to accept the oats and give shipping orders therefor to defendant, at Clinton, Missouri; that plaintiffs would pay defendant thirty-five cents per bushel for said oats, and pay for the same on such delivery; that a reasonable time had elapsed; that plaintiffs were ready and willing all the time to receive and pay defendant for said oats, according to the contract; that defendant refused and failed to deliver the same according to said contract; that plaintiffs were damaged and prayed judgment accordingly.

The charges in the second and third counts are substantially the same as to the alleged breaches; and the charges in the fourth and fifth counts are similar, except they relate to corn instead of oats, the breaches assigned being for the non-delivery of the corn, according to the terms of the agreement.

The answer of defendant admits the contracts as set out in the respective counts separately, except that it denies the allegations as to the time of the delivery; and substantially avers the contract to be that defendant was to deliver the said corn and oats to plaintiffs on board the railway cars at Clinton, Missouri, only after being directed so to do by plaintiffs, and after receiving from plaintiffs shipping orders therefor. The answer for a further and special defense to plaintiffs' cause of action avers that on or about October 13, 1890, plaintiffs notified defendant that they would be no longer bound by the terms of said contract; and that they would not receive the grain therein contracted to be delivered to them; and that defendant could consider himself released therefrom; and that immediately upon receipt of said notice he wrote plaintiffs accepting their release from said contract, and consented that the same be set aside.

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A replication was filed by plaintiffs denying the new matter set up in the answer. The third count was abandoned. By consent of parties a jury was waived and the cause submitted to the court for trial. The plaintiffs produced and offered evidence in support of the allegations of the petition, and the defendant produced and offered evidence in support of the defense set up in the answer.

B. G. Boone, for plaintiffs in error.

(1) The instruction given by the court, at the instance of the plaintiffs, on the question of custom or usage, is unquestionably correct, and clearly announces the true rule, while the instruction asked by the defendant and given by the court is not the law. The instructions on the question of custom and usage are in conflict. The one or the other must be wrong. These two instructions are conflicting and cannot stand together. The principle announced in the plaintiffs' instruction is fully supported by the ruling of the supreme court in the cases of *Walsh v. Trans. Co.*, 52 Mo. 434; *Kimball v. Brainer*, 47 Mo. 398; *Freight Co. v. Stanard*, 44 Mo. 71, 82. The instruction of defendant is defective, in that it wholly omits the place or *locus in quo* of the transaction, and the knowledge, personal or constructive, of the parties to the contract. 52 Mo. 434, *supra;* 47 Mo. 398, *supra;* 44 Mo. 71, *supra.* (2) The court erred in declaring at the instance of defendant, as a matter of law, that the letter of plaintiffs to defendant, of date October 13, 1890, and read in evidence, was an offer on the part of plaintiffs to cancel the existing contracts between plaintiffs and defendant. As to whether said letter was or was not an offer to cancel the contracts, was a question of fact for the consideration of the jury or the court sitting as a

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jury. "A party may always testify as to the intention with which he did an act, whenever it is material to the issues to determine what such intention was." *Vansickle v. Brown*, 68 Mo. 627, 634; *Fisk v. Chester*, 8 Gray, 506; *Thatcher v. Phinney*, 7 Allen, 146; *Snow v. Paine*, 114 Mass. 520. (3) In conclusion, it is urged that the court erred in admitting the evidence of defendant as to custom and usage. Even if admissible, it was wholly insufficient to establish a custom or usage of eight days, or five days, and should have been excluded.

Thos. M. Casey and *Calvird & Lewis*, for defendant in error.

(1) It was the duty of the court to construe plaintiffs' letter of October 13, 1890, on the question as to whether or not it was a cancellation. 2 Parsons on Contracts [6 Ed.] sec. 492, p. 648; *Edwards v. Smith*, 63 Mo. 119; *Fruin v. Railroad*, 89 Mo. 397; *Lumber Co. v. Warner*, 93 Mo. 374. (2) The court did not err in refusing to let plaintiff testify what his intention was in writing the letter of October 13. Parsons on Contracts [6 Ed.] sec. 496, p. 642. (3) The two instructions on custom and usage are not conflicting in the light of the facts of this case. (4) Under the evidence in this case the finding must have been for defendant, and, therefore, no error in giving or refusing instructions can work a reversal. *Fitzgerald v. Baker*, 96 Mo. 661.

Ellison, J.—We have substantially adopted the statement of the case as made by plaintiffs, and, from that statement of the issues between the parties and of the legal questions involved in connection with the action of the court thereon, are of the opinion that the judgment should be affirmed.

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The cause being heard by the court without a jury we will not give that critical examination of the instructions we otherwise would, since when no jury is called we only look to the instructions to discover the theory upon which the trial court proceeded. Keeping this in view it is evident that plaintiffs have no just ground to complain of the two instructions as to custom, one for plaintiffs and one for defendant, on the score of inconsistency. The two read together as one show that the court's view of the law of custom was correct and not inconsistent when applied to the case.

The plaintiffs contend that the court erred in construing their letter to defendant as an offer of cancellation. We think not. The portion of the letter necessary to notice follows a lengthy complaint of defendant's action under the contract, and is of the following purport (italics, ours): "In conclusion, we would say that if you hold such opinions as stated in your letter, it is much better that our mutual transactions *should cease.* There is no reason, whatever, why we should lose anything by this car. We, therefore, add interest to our new bill against you for the car. Formerly our business relations together have been very pleasant, and if things can continue in their accustomed way we should be very glad to trade again with you, *but not otherwise.*"

To this the defendant made the following answer: "So far as your relations with me ceasing, that is all right. I will load the car for Laredo, in fact, the car may now be loaded, for all I know, and that can end our business relations, as you so wish. I wrote you over a week since for billing for unfilled orders, and, as you do not send them, will cancel same." We regard plaintiffs' letter as a proposition for cancellation and defendant's answer as an acceptance. And in this connection will state that it was proper for the court to

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interpret and construe the two writings. *Edwards v. Smith*, 63 Mo. 119; *Fruin v. Railroad*, 89 Mo. 397; *Black River Lumber Co. v. Warner*, 93 Mo. 374. Plaintiffs' intention in writing this letter seems to be sufficiently plain and apparent from its terms, and any explanation as to private intention ought not to be permitted to control its evident meaning.

So far as we are advised by this record it was proper to admit evidence as to custom in relation to contracts like the one involved herein. No evidence is presented to us by the abstract. No objections to testimony appear. The fact that appellants have set out in their brief matters which they state were admitted to have been proven, or, if not admitted, conclusively proven, cannot dispense with the necessity of objections to testimony and exceptions taken to the overruling of such objections, in order that we may notice them.

We can discover no error at the trial and, therefore, affirm the judgment. All concur.

THE KINGSTON SAVINGS BANK, Appellant, v. JOHN E. BOSSERMAN, Respondent.

Kansas City Court of Appeals, January 2, 1893.

1. **Alteration of Instrument:** MATERIAL OR IMMATERIAL; VITIATES. Any alteration by the holder of a promissory note after delivery and without the consent of the maker, however immaterial in its nature, will vitiate the instrument and render the same void.

2. ——: ——: INNOCENT HOLDER: BLANKS. It is immaterial whether the payee or his assignee may have been guilty of making the alteration, the instrument became void when the alteration was made; and there can be no innocent third party in this case since it was not a carelessly drawn instrument with blanks left unfilled.

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Appeal from the Caldwell Circuit Court.—Hon. Wm. Henry, Special Judge.

Affirmed.

Crosby Johnson with *C. S. McLaughlin* and *S. C. Rogers*, for appellant.

(1) A change in an instrument, that does not vary its meaning or affect its operation, does not amount to an alteration nor make the instrument void. *B. & L. Ass'n v. Fitzmaurice*, 7 Mo. App. 283; 2 Parsons on Contracts [7 Ed.] 856, side p. 718; Daniel on Negotiable Instruments, secs. 1373, 1398. (2) Nothing less than a material alteration of an instrument will render it void in the hands of an innocent holder. *State to use v. Dean*, 40 Mo. 464; Daniel on Negotiable Instruments, sec. 1405; *Bank v. Murdock*, 62 Mo. 70; *Pub. Co. v. Aldine Press*, 126 Pa. St. 347.

William McAfee, *James M. Davis* and *William A. Wood*, for respondent.

(1) The evidence is silent as to whether the alteration in the note, proved by defendant, was made before it came into the hands of the plaintiff bank or was made by plaintiff's cashier or other agent after the purchase. (2) "The rule is now firmly established in this state that any alteration of a written instrument after delivery, however immaterial in its nature or however innocently made, without the consent of all the parties vitiates the instrument." *Moore v. Bank*, 22 Mo. App. 684; *Morrison v. Garth*, 78 Mo. 437; *Bank v. Fricke*, 75 Mo. 178; *Moore v. Hutchinson*, 69 Mo. 429; *Bank v. Armstrong*, 62 Mo. 59; *Bank v. Dunn*, 62 Mo. 79; *Evans v. Foreman*, 60 Mo. 449; *Haskell v. Champion*, 30 Mo. 136; *Miller v. Gilliland*, 19 Pa. St.

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119; *Hord v. Taubman*, 79 Mo. 101. (3) The alteration is a material one. 5 Lawson's Rights, Remedies & Practice, sec. 2476, p. 4105; *Holland v. Hatch*, 11 Ind. 497; 71 Am. Dec. 363; *Reeves v. Pierson*, 23 Hun, 185.

GILL, J.—This is an action on the following promissory note:

"$120.00. POLO, MO., July 30, 1890.

"Six months after date I, or we, or either of us, promise to pay to the order of Wm. Downing $127, for value received, with interest at the rate of ten per cent. per annum, *hereby intending to charge my separate estate and property*.

"(Signed) J. E. BOSSERMAN."

Plaintiff sues as an indorsee before maturity and for value. The defense relied upon is that when the note was executed and delivered to Downing the words, "*hereby intending to charge my separate estate and property*," did not appear, but that the instrument was subsequently altered by inserting said words without the knowledge or consent of the defendant. This question of fact was put in issue and tried by the court, sitting as a jury, who found thereon in favor of defendant, and from a judgment entered for him the plaintiff appealed.

The theory for the prosecution of this appeal is manifested in plaintiff's second instruction offered, but refused by the trial court. It reads as follows: "2. The court declares the law to be that the alleged alteration of the note in question was an *immaterial* alteration when said note was given by defendant, and could only become a material alteration, if given by a married woman, and did not affect the liability of the parties to the note, even though the court may find

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that the alleged alteration was made by the payee therein before the same was transferred to the bank."

The court at the instance of the defendant gave the following instruction: "The court declares the law to be that, taking the pleadings in connection with the evidence, the plaintiff is entitled to recover, unless the court sitting as a jury finds from the evidence that there was some unauthorized alteration made in the note sued on, as alleged in the answer, after the note was signed and delivered; but if, without the consent or authority of the defendant, before the commencement of the suit, and after the signing and delivery of the note, it was altered by inserting therein the words, 'hereby intending to charge my separate estate and property,' then the finding and judgment must be for the defendant."

In other words, the plaintiff contends that, even if said words were, without authority, inserted in the face of the note after the making and delivery thereof by defendant, yet that the words effected no material modification in the contract, and would not invalidate the note in the hands of the plaintiff, while the defendant claimed, and the lower court so held, that the altering of the terms of the note by adding the words rendered the instrument void, and that, too, regardless of the fact whether the changes thus wrought were material or immaterial. Now whilst we can but admit much force in the able argument of plaintiff's counsel, the point here involved is decided in this state repeatedly against his contention. It has been uniformly held in this state by a long line of cases that any alteration by the holder of a promissory note after delivery and without the consent of the maker, and however immaterial in its nature, will vitiate the instrument and render the same void. *Haskell v. Champion*, 30 Mo. 136; *Capital Bank v. Armstrong*, 62 Mo. 60;

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First Nat. Bank v. Fricke, 75 Mo. 178; *Morrison v. Garth*, 78 Mo. 434; *Moore v. Bank*, 22 Mo. App. 684. In the *Fricke case*, *supra*, the authorities are fully reviewed, and the doctrine settled as was held by the circuit court in the case at bar.

Nor is it material in this case whether the payee named in the note or his assignee may have been guilty of the alteration. *Capital Bank v. Armstrong*, *supra*. If Downing thus, without the consent of the defendant, added the words here complained of, then the obligation became void, and when the plaintiff acquired the same it got no better title than he, Downing, had. This is not a case where the defendant loosely or carelessly drew an instrument with blanks left for the payee to fill, so that he, the maker, should be compelled to suffer rather than an innocent third party. For here no blank space was left unfilled, but the change in the instrument was effected, apparently, by impressing the added words with a rubber stamp in different colored ink, and in type entirely unlike the body of the note. Judgment affirmed. All concur.

Peter Pierson, Respondent, v. Aaron Slifer, Appellant.

Kansas City Court of Appeals, January 2, 1893.

1. **Fraudulent Conveyances:** PARTICIPATION IN FRAUDULENT DESIGN. One who purchases of a vendor, selling with intent to hinder and delay his creditors, will not be a *bona fide* purchaser, if he participates in the fraudulent purpose of his vendor, or knew of his intent, or of facts sufficient to put him on his inquiry.

2. ———: KNOWLEDGE BEFORE PAYING PURCHASE MONEY: NOTE. Though the purchaser of a fraudulent vendor did not know of his fraudulent design at the time of the purchase, yet, if he knew thereof

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before paying the purchase money, he will not be protected; but this rule will not apply where a note is given for a part of the purchase, which before due has passed into the hands of an innocent party.

3. **Practice, Appellate**: REVIEWING FACTS. When the cause is tried before the court without a jury, the appellate court will no more interfere with the finding of facts than with the verdict of the jury.

4. ——: INSTRUCTIONS: MOTION FOR A NEW TRIAL. The complaint that a finding in replevin was excessive by two barrels of whiskey will not be noticed in the appellate court, when no such point was made by instruction or in the motion for a new trial, and the statement in the motion that the verdict is against the evidence and the weight of evidence is not sufficient.

5. **Evidence**: WHETHER GOODS PAID FOR: HARMLESS ERROR. Where the purchaser's good faith is in issue, whether he thought the goods bought were paid for may if properly connected be pertinent, but in this case its rejection in evidence is harmless, since he testified he knew of no debts except those he assumed.

Appeal from the Livingston Circuit Court.—HON. JOHN E. WAIT, Special Judge.

AFFIRMED.

H. B. Davis and *Lewis A. Chapman*, for appellant.

(1) If the object of the defendant in the attachment in making the sale to the vendee was to defeat the creditors in their efforts to collect their debts, three conditions must concur to protect the vendee's title: *First*. He must buy without notice of the bad intent on the part of the vendor. *Second*. He must be a purchaser for a valuable consideration. *Third*. He must have paid the purchase money before he had notice of the fraud. *Cheek v. Waldron*, 39 Mo. App. 21. (2) So that at the time of the levy there was $1,045.50 unpaid of the alleged purchase money. If the whole consideration had not been paid it vitiated the whole transaction. *McNichols v. Rubleman*, 13 Mo. App. 515–22; *Allen v. Berry*, 50 Mo. 90; *Cheek v.*

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Waldron, 39 Mo. App. 21; *Dougherty v. Cooper*, 77 Mo. 528; *Arntrolett v. Hartwig*, 73 Mo. 485; *Young v. Kellar*, 94 Mo. 581; *Coffin Co. v. Rubelman*, 15 Mo. App. 280. (3) The court erred in sustaining plaintiff's objection to defendant's question on plaintiff's cross-examination: "You thought these whiskeys were paid for?" (4) The case was tried by the court sitting as a jury, and this court will not consider the instructions, but will review the whole case paying regard to the instructions only as indicating the theory on which the case was tried. *State ex rel. v. Shobe*, 23 Mo. App. 474.

Frank Sheetz, for respondent.

(1) Appellant claims that plaintiff's recovery was excessive by two barrels of whiskey. The appellant has set out in his abstract such evidence as he desires, and gives the remainder "substantially." This court will not go through the record and weigh the evidence, and, besides, no such point was called to the attention of the trial court by motion for new trial or otherwise. *Orr v. Rode*, 101 Mo. 399; *Fox v. Young*, 22 Mo. App. 388. (2) Appellant complains that the lower court erred in excluding the question put to plaintiff: "You thought these whiskeys paid for?" This objection was not specifically called to the attention of the trial court in the motion for new trial. The general objection to the exclusion of evidence is not sufficient therein. There was no error in excluding it. It made no difference if plaintiff knew they were not paid for, if he bought them honestly, and the court found that he did. *Morgan v. Wood*, 38 Mo. App. 264, and cases cited. (3) The instructions given by the court on behalf of appellant were more than he was entitled to, and those refused were not the law of this case. If appellant wished this court to pass on their refusal, he

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should have given all the testimony, and not what he considers the substance of it. *Pembroke v. Railroad*, 32 Mo. App. 69; *City of Kansas v. O'Connor*, 36 Mo. App. 597. The appellant has overlooked the distinction made by the books, where a creditor buys, and a mere purchaser. *Morgan v. Wood*, 38 Mo. App. 264; *Shelley v. Booth*, 73 Mo. 77; *Albert v. Besel*, 88 Mo. 152; *Frederick v. Allgaier*, 88 Mo. 603; *Sexton v. Anderson*, 95 Mo. 379.. (4) This case was fairly tried and the lower court heard all the evidence, and saw the witnesses. The appellant called Mr. Schneider in his behalf, and examined him to his satisfaction, and failed to show any fraud or knowledge of fraud on the part of respondent, and the trial court so found, and this court, with only part of the evidence before them will not interfere with that finding. The judgment is for the right party, and should be affirmed.

Ellison, J.—This is an action of replevin whereby it is sought to recover the possession of a certain stock of saloon merchandise. Plaintiff recovered below on a trial before the court without a jury.

Defendant is the sheriff of Livingston county, and justifies his possession and detention of the goods by reason of several writs of attachment which he levied upon them at the suit of several creditors of one Schneider, from whom plaintiff purchased the stock. That Schneider sold to plaintiff for the fraudulent purpose of hindering his creditors, seems to be conceded; and it is so declared in defendant's instructions. This leaves only the question whether plaintiff participated in such fraud. That question was before the trial court sitting as a jury, and has been determined in plaintiff's favor under declarations of law given at defendant's instance, which were as full, liberal and complete a statement of defendant's theory as he could

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reasonably ask. No declarations were asked by plaintiff, and of the three refused for defendant all in them which was proper had been already covered by those given. All else in them was improper. Those given declared in terms that Schneider's purpose in selling was to defraud his creditors, and, that if plaintiff participated in this design, or knew of such intent, or knew facts sufficient to put a reasonable man on inquiry, that he could not recover. They further declared that although plaintiff had no knowledge at the time of the sale to him, yet, if he had such knowledge before paying the purchase money, he would not be protected. And, finally, that all these matters could be proven by circumstances. Certainly the defendant ought not to complain of these declarations. It is true that as a part of the consideration of the purchase plaintiff gave his note, which was not paid at the time of the attachment, but it was transferred to third parties. So the debts assumed by the plaintiff were not at the time paid, but his obligation to pay them was complete.

From a remark in defendant's brief it appears to be asserted, though probably not intended, that, since the cause was tried by the court without a jury, we are authorized to go into the whole case and pass upon the weight of the evidence. This we cannot do any more than we would interfere with the verdict of a jury. The court stands, by the action of the parties, as a jury. It is not for us to say whether the finding was right or wrong if there was evidence to sustain it.

The point is made that the finding is for two barrels of whiskey not shown to have been purchased by the plaintiff. No such point was made by the declaration given or refused, and no such point is made in the motion for new trial. We will, therefore, not notice it. *Orr v. Rode*, 101 Mo. 399; *Jacobsmeyer*

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v. Poggemoeller, 47 Mo. App. 560; *McNichols v. Nelson*, 45 Mo. App. 446; *Fox v. Young*, 22 Mo. App. 386. A statement in the motion for new trial, that the verdict is against the evidence or against the weight of the evidence, is not sufficient to call the attention of the court to a complaint of excessive verdict; or to specific property among a large lot not being included in the proof.

The only matter presented which has given us any trouble was when the court refused to permit the plaintiff to be asked on cross-examination whether he "thought these whiskeys were paid for," when he purchased them. This question being on cross-examination might probably have been followed by other matters with which it could properly connect, and thus possibly impeach plaintiff's good faith in his purchase. But since plaintiff had already, on cross-examination, explicitly declared that he knew of no debt owing by Schneider (save those he assumed), we do not deem the refusal of the question to be a prejudicial error.

We find nothing in the record to justify us in disturbing the judgment, and it is, therefore, affirmed. All concur.

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Reid, Murdock & Co., Appellants, v. Lloyd & Moorman, Respondents.

Kansas City Court of Appeals, January 2, 1893.

1. **Definitions:** SOLVENCY. Solvency consists not only of the present ability of a debtor to pay his debts, but of his being in such condition of his means that payment may be enforced.

2. **Sales:** INTENTION AND ABILITY TO PAY: JURY QUESTION. A knowledge on the part of the purchaser at the time of making the purchase that he will not be able to pay for the goods is equal to an intent not to pay for them, and under the facts of this case the question of such intent should be submitted to the jury.

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3. ———: FRAUD: TITLE: RULE AS TO SUBSEQUENT VENDEE. Marr & Shelton bought of plaintiffs a bill of goods when insolvent, but representing themselves as solvent. They shortly afterwards sold to the defendants. *Held,* if they bought said goods without intending to pay for the same, then no title passed to them which they could pass to defendants unless such goods were sold and delivered to the defendants for a valuable consideration, and in the usual and customary manner of making such transactions without any knowledge of Marr & Shelton's fraud, or of such facts as would put a man of common prudence on his inquiry.

4. ———: ———: SUBSEQUENT PURCHASER: PROCEDURE. Marr & Shelton purchased goods of plaintiffs without intending to pay for them, and sold them to defendants, of whom plaintiffs replevied them. *Held,* after plaintiffs' evidence showed the intention not to pay, the burden of proof was cast upon the defendants' to show in a general way that they purchased in good faith, and for value, after which plaintiffs, should show circumstances warranting the inference that defendants knew of the fraud or of facts to put them on inquiry.

5. ———: ———: ———: JURY QUESTION. Where a subsequent vendee of such fraudulent purchaser does not purchase in the usual and customary manner, *e. g.*, without taking an inventory, and knows his immediate vendors were embarrassed and compelled to close up their business, there is sufficient to put him on his inquiry, and to send the case to the jury.

Appeal from the Livingston Circuit Court.—HON. E. J. BROADUS, Judge.

REVERSED AND REMANDED.

Scott J. Miller and *Frank Sheetz*, for appellants.

(1) Where one purchases goods intending never to pay for them, the sale is voidable at the election of the seller, and, as between the parties, property in the goods does not pass. Where a third party, with notice of facts which would put an ordinarily prudent man on inquiry, purchases the goods from the fraudulent vendee, the original owner may recover them, or their value from such third parties. *Thomas v. Freligh*, 9 Mo. App. 151; *Elsass v. Harrington*, 28 Mo. App. 300; *Price*

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v. Lederer, 33 Mo. App. 426; *Leedom v. Fruit Co.*, 38 Mo. App. 425. (2) Where a merchant makes a purchase shortly before failure, and at a time when his business is hopelessly swamped, it must be left to a jury to say whether he intended to pay for the goods. A knowledge on the part of a purchaser at the time of making the purchase, that he will not be able to pay for the goods, is tantamount to an intent not to pay for them. *Elsass v. Harrington*, 28 Mo. App. 304. There was sufficient evidence showing that Marr & Shelton never intended to pay for the goods, and that makes a *prima facie* case. *Price v. Lederer*, 33 Mo. Mo. App. 434. And casts the burden of proof on the defendants to show that they bought in good faith for value, and in the ordinary course of dealings, after which it would be incumbent on the plaintiffs to show a state of circumstances warranting the conclusion that the defendants either had knowledge of the intent with which the goods were purchased by Marr & Shelton or knowledge of facts sufficient to put an ordinarily prudent and sagacious man upon inquiry in respect to that matter. *Leedom v. Fruit Co.*, 38 Mo. App. 438. The court erred in taking the case from the jury, and the judgment should be reversed.

Lewis A. Chapman, for respondents.

(1) The court committed no error in sustaining the demurrer to the testimony of the plaintiffs. There was no evidence that Marr & Shelton ever purchased any of the goods taken by the sheriff on the writ, not intending to pay for them. There is no evidence even of any of the goods taken having been purchased at the last sale. There was no evidence even of insolvency of Marr & Shelton. "The legal sufficiency of the evidence was for the court to determine. It is the

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province of the court to determine the legal effect of the evidence." *Harris v. Woody*, 9 Mo. 113; *Boland v. Railroad*, 36 Mo. 484–491; *Meyer v. Railroad*, 40 Mo. 151; *Clark v. Railroad*, 202–217; *Charles v. Patch*, 87 Mo. 450; *Maher v. Railroad*, 64 Mo. 267.

SMITH, P. J.—Action, replevin to recover the possession of certain articles of merchandise. Answer, general denial and claim of property. At the trial there was a demurrer to the plaintiffs' evidence interposed and by the court sustained, and from the judgment thereon the plaintiffs appeal. We are, therefore, called upon to review the action of the court upon the demurrer.

The disclosure of facts made by the evidence is something like this: The plaintiffs were wholesale grocer merchants at Chicago, and Marr & Shelton were retail dealers at Brookfield in this state. The traveling salesman, Cloud, of plaintiffs, had been in the habit of calling every two weeks on Marr & Shelton for about nine months prior to the last sale made by him to them, and taking from them orders for such goods as they would need which would be sent on to plaintiffs and by them filled and shipped. The amount of these sales was something like $900 outside of the amount of the last bill sold. At the date of the last sale made by Cloud, he had a conversation with Shelton, one of the firm of Marr & Shelton, during which the latter showed the former a letter he had received from the plaintiffs in answer to one written by Marr & Shelton asking an extension of the time of the payment of their indebtedness. In this conversation Shelton represented to Cloud that his firm did not owe more than $800 or $900, and that it did not owe but very little outside of the amount due plaintiffs.

It does not appear what goods were comprised in the last sale made, nor does the amount thereof any-

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where appear. None of the goods described in the petition and taken from defendants' possession, unless, possibly, a few cases of canned tomatoes and corn, were identified as a part of the last bill sold to Marr & Shelton. They were possibly some of the goods that had been previously sold by plaintiffs to them. About ten days after Marr & Shelton had given plaintiffs their last order for goods, the former sold out their entire stock to the defendants for $1,000 in cash. This seems to have been about a fair cash value for the stock. Marr & Shelton both at the time they made their last purchase of plaintiffs, and at the time they sold out to defendants, were indebted something like $2,500. There was, however, no evidence that they had been sued or that their pecuniary condition was generally known in the place where they did business.

It thus appears that Marr & Shelton were hopelessly insolvent at the time they purchased their last bill of goods of plaintiffs as well as at the time they sold out to defendants. Solvency consists not only of the present ability of a debtor to pay his debts, but of his being in such condition of his means that payment may be enforced by law. *McDonald v. Cash & Hainds*, 45 Mo. App. 66; *Eddy v. Baldwin*, 32 Mo. 360; *State ex rel. v. Koontz*, 83 Mo. 323. Tested according to this rule it is obvious enough that Marr & Shelton were insolvent at the time of the two transactions just stated. They must have known when they made their false representations as to their indebtedness to plaintiffs' agent that they could not pay for the goods they were ordering. They knew too that they could not continue business. And under these circumstances it should have been left to the jury to say whether they ever intended to pay for the goods. A knowledge on the part of the purchaser at the time of making the purchase that he

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will not be able to pay for the goods is equal to an intent not to pay for them.

It is true that as a general rule the mere fact of insolvency of the vendee, and that he knew the same, is not sufficient of itself to take the case to the jury, unless the insolvency is so gross that the evidence of it is known to the vendee, would authorize the inference that he never intended to pay for the goods, or unless there be substantial evidence of the other circumstances to support the inference of such fraudulent intent. *Elsass v. Harrington*, 28 Mo. App. 305; *Leedom v. Ward, etc., Co.*, 38 Mo. App. 425; *Thomas v. Freligh*, 9 Mo. App. 151; *Price v. Lederer*, 33 Mo. App. 425. Upon this proposition we think the evidence was quite sufficient to have justified the submission of the case to the jury. If Marr & Shelton obtained of plaintiffs their last bill of goods by false representations as to their circumstances, and without intending to pay for the same, then no title passed from plaintiffs to them which they could pass to defendants, unless such goods were sold and delivered to defendants for a valuable consideration, and in the usual and customary manner of making such transactions without any knowledge on the latter's part of the fraud and misrepresentation of Marr & Shelton to plaintiffs, and without such facts coming to their knowledge as would put a man of common sagacity, care and prudence on his inquiry. The evidence being, as we have already stated, sufficient to warrant the inference that Marr & Shelton purchased the goods without intending to pay for them, the burden of proof was cast upon defendants to show in a general way that they purchased the goods in good faith and for value, after which it would have been incumbent on the plaintiffs to show a state of circumstances warranting the inference that the defendants either had knowledge of the intent with which the goods were purchased or a

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knowledge of facts sufficient to put an ordinarily prudent and sagacious man upon his inquiry. The plaintiffs, however, in such case may relieve the defendants from this burden by a collection of facts which their own evidence tends to establish.

We do not think that the plaintiffs' evidence in a general way tended to show that the purchase made by the defendants was for value, in good faith, and as is usual and customary in transactions of the kind. It was disclosed that the defendants took no inventory of the stock of goods they were purchasing, but purchased them in a lump—merely approximating the value by mere conjecture. Besides this it was shown that the defendants knew that Marr & Shelton were embarrassed and compelled to close up their business. These facts were sufficient to warrant the conclusion that the defendants had knowledge of the intent with which the goods were purchased or, if not, they were at least sufficient to put them on their inquiry in respect to the matter. The evidence adduced by plaintiffs made a *prima facie* case and clearly entitled them to go to the jury, at least as to the cases of canned tomatoes and corn described in their petition. It follows that the court erred in withdrawing the case from the jury.

As to the error complained of in respect to the judgment, it is sufficient to say that the irregularity, if such it be, was cured by the agreement of the parties, and besides it is of no consequence since we shall reverse the judgment for the reasons already indicated.

The judgment will be reversed and the cause remanded. All concur.

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The State of Missouri, Respondent, v. George N. White, Appellant.

Kansas City Court of Appeals, January 2, 1893.

1. **Criminal Procedure:** CONVICTION OF LESSER OFFENSE. Though the indictment be for a felony,—as an assault to commit rape,—the conviction may be of a simple assault.

2. **Criminal Law:** SUFFICIENCY OF EVIDENCE: ASSAULT. The evidence in this case is *held* sufficient to justify a jury in the inference that defendant placed his hand on the prosecutrix, or retained his hold upon her, against her will, for a lustful and immoral purpose, which amounts to an assault.

3. ———: ASSAULT: VIOLENCE: LUST. To touch a virtuous wife in the way of illicit love is a far greater outrage than to touch her in anger, and equally a breach of the peace; one is the assault of violence, the other of lust.

4. ———: DIFFERENCE IN ASSAULTS. There is a wide difference between an assault with intent to commit a rape and an assault with intent, merely, to have an improper sexual connection.

5. ———: ASSAULT: INSTRUCTION: EVIDENCE. As there was not sufficient evidence to support a verdict for assault with intent, etc., it was error to submit that issue to the jury by instruction.

6. ———: ———: SOLICITATION. The mere verbal solicitation of a woman does not constitute an assault.

Appeal from the Hickory Circuit Court.—Hon. W. I. Wallace, Judge.

Reversed and remanded.

S. H. White, for appellant.

(1) There is no evidence, whatever, even tending to establish an assault with intent to rape, and it was clearly the duty of the court to so instruct the jury. To establish that offense, "there must be evidence of

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an intent to use whatever amount of force is necessary to overcome resistance, and accomplish the purpose." *State v. Priestly*, 74 Mo. 24; *State v. Kendall*, 73 Iowa, 255. By the testimony of Mollie Rhea, the prosecutrix herself, the defendant is exonerated from any act or intent. *State v. Bergdorf*, 53 Mo. 65. (2) We maintain that one indicted for an assault with intent to commit rape cannot be convicted of a simple assault, and, even if it were the law to so convict, the verdict in this case does not find defendant guilty of simple assault, nor does it assess a punishment or fine allowed by law for the higher offense, and is, therefore, not responsive to any issue submitted to the jury, and will not support a judgment. *State v. Steptoe*, 1 Mo. App. 19; *State v. Pickels*, 1 Mo. App. 21.

F. Marion Wilson, also, for appellant.

(1) Under the ruling of the supreme court of Missouri, *State v. Owsley*, 102 Mo. 678, there was no assault in this case. Kelley's Criminal Law, sec. 573; *State v. Priestly*, 74 Mo. 24; Bouvier's Law Dictionary, p. 191; Wharton's American Criminal Law, p. 460; 1 Russell on Crimes, p. 750; 3 Greenleaf on Evidence [14 Ed.] sec. 59. (2) Under a proper instruction given, defining an assault, the evidence in this case does not show that there was an assault. It must be proved that there was an unlawful attempt to commit violent injury. 2 Thompson on Trials, sec. 2194; *State v. Harney*, 101 Mo. 470.

John M. Wood, for respondent.

(1) The evidence was sufficient to sustain the verdict in this case. (2) The court properly submitted the case under sections 3490 and 3492, Revised Stat-

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utes. *State v. Webster*, 77 Mo. 566; *State v. Robb*, 90 Mo. 30; *State v. Schloss*, 93 Mo. 361. (3) For the reasons above given, the court did not err in refusing. to give instructions numbers 1 and 6 inclusive asked by the defendant.

Ellison, J.—The defendant was indicted for an assault with intent to commit rape. He was convicted of a simple assault, and fined $71. He appealed the case to the supreme court. That court transferred the case here on the ground that it had no jurisdiction.

Notwithstanding the indictment was for felony, the defendant may now, under the general statutes, be convicted of a simple assault. Revised Statutes, 1889, sec. 3950; *State v. Phipp*, 34 Mo. App. 400; *State v. Schloss*, 93 Mo. 361; *State v. Karnes* (decided this term). This disposes of much of defendant's complaint.

The principal question left for our consideration is whether there was evidence in the case from which the jury could, under the principles of law, find defendant guilty of an assault merely. Our opinion is that there was. The prosecutrix testified, in substance, that she had not been well; that defendant was her family physician, and that he stopped at her house during the absence of her husband, stating to her that her husband requested him to do so; that he felt her pulse, looked at her tongue, told her that she was in bad condition and that he would have to make "an examination." She asked him to wait till her husband could be present, but he insisted on the examination then, as he did not know when he could be out in that vicinity again; that she then submitted to an examination; that during this examination (just when does not clearly appear), defendant took hold of her arm, and began to make indecent demonstrations, when she

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"jerked loose from him." He then took hold of her arm again, and solicited her to submit to him, when, upon her threatening him, he desisted, asked her pardon and left the house.

There was evidence introduced for the purpose of discrediting her; but the defendant himself testified that he had been requested by the prosecutrix's husband to stop at the house, and show her how to adjust or place a certain instrument or contrivance sometimes used (as she states) to prevent conception; that "when I was introducing it I had hold of her right arm with my left hand, and, when I finished putting it in place, I let the hand down, and she leaned towards me. As soon as I had it in place I let go of her hand, and says, 'We might try this now.' She jumped back, and looked at me, and I says, 'I beg your pardon; I have made a mistake,' and she said: 'You had no business to say that, and I will never think half as much of you as I have.' I told her to tell her husband about it, and they could do as they pleased about telling anyone else. * * * I had no intention of having connection with the woman against her will."

There is enough in this testimony of defendant, unaided by the other evidence, to justify the jury, if properly instructed, in inferring that he placed his hand upon the prosecutrix, or that he retained his hold upon her, against her will, for a lustful and immoral purpose; and this, in our opinion, would amount to an assault.

The defendant's contention appears to be that there can be no assault without an attempt to do some violent bodily injury or hurt, and definitions are quoted to maintain this proposition, But these definitions must not be understood as excluding everything which is not an attempt to bodily wound, injure or disfigure in the ordinary sense of these words. For

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instance, it was held an assault and battery for a man to put his arm licentiously, though tenderly, about the neck of a woman against her will. *Goodman v. State*, 60 Ga. 509. The court, among other things, said: "To beat, in a legal sense, is not merely to whip, wound or hurt, but includes any unlawful imposition of the hand and arm. The slightest touching of another in anger is a battery. To touch a virtuous wife in the way of illicit love is a far greater outrage than to touch her in anger, and equally a breach of the peace. It is violence proceeding from lust, instead of violence proceeding from rage. It issues from the passion, which, unrestrained, culminates in rape, instead of from the passion which culminates in homicide." So it was held an assault for a man to go into a woman's private sleeping apartment against her will, while she was in bed, and sit upon the bed and bed clothing, lean over her and solicit sexual intercourse. *Newell v. Whitcher*, 53 Vt. 589. And a defendant was held guilty of an assault and battery who gave to a girl a fig containing a "love powder," a deleterious drug, which she ate, without knowing that it contained the powder, and injured her health. *Commonwealth v. Stratton*, 114 Mass. 303.

We are aware that in this state care and strictness are very properly required in the proof of an assault with intent to commit rape; that the proof should show that the defendant's intention was to force compliance with his desire at all hazards, regardless of resistance by the female as shown by authorities in counsel's brief. But it must be remembered that there is a wide difference between an assault with intent to commit rape and an assault with intent, merely, to have an improper sexual connection. *Regina v. Staunton*, 1 C. & K. 415; *Irving v. State*, 9 Tex. App. 66. Of the

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former, defendant has practically been found not guilty by the jury, as he should have been, since, in our opinion, there is no evidence upon which a verdict of guilty of an assault with attempt to commit rape could rest.

It was, therefore, error in the court to give an instruction to the jury on the subject of rape, as its evident tendency was to prejudice defendant and prevent his having a fair trial, to which he is entitled. On the other hand, the court should have given defendant's instruction number 2, declaring there was no such evidence. The court should also have given defendant's instruction number 3, wherein it is declared that mere verbal solicitation of a woman for sexual intercourse does not constitute an assault. There was evidence, under defendant's theory, upon which such instruction could rest. So, in the same connection and for the same reason, defendant's fourth instruction should have been given. The fifth instruction was properly refused on account (as shown above) of the definition of an assault as applied to the peculiar facts of this case. And for the same reason the court's first instruction of its own motion should not have been given. There should be given an instruction as to reasonable doubt, and probably was in this case, though it does not appear in the printed abstract. For the foregoing errors in the instructions the judgment will be reversed and the cause remanded. All concur.

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GEO. W. LINDSEY, Appellant, v. THOMAS DIXON, Defendant; ELIZA B. DIXON, Interpleader and Respondent. 52 291 82 601

Kansas City Court of Appeals, January 2, 1893.

1. **Attachment:** INTERPLEA: EXEMPTIONS CLAIMED BY WIFE: NON-RESIDENCE OF HUSBAND. By section 4908, Revised Statutes, 1889, the wife of an absconding husband can claim the exemptions allowed by section 4903, or may select and hold as exempt any other property not exceeding $300 in value, although the absconding husband has not the articles exempted by the statute, and she may sue for and recover the same in her own name and can interplead therefor in an attachment suit against her husband, and can only be defeated therein by the non-residency of the husband.

2. **Practice, Trial:** ATTACHMENT: INTERPLEA OF WIFE: NON-RESIDENCY. As the interplea must invariably be determined before a judgment in the attachment can be rendered, the bare allegation of the non-residency of the husband in the affidavit for the attachment cannot conclude the wife on the trial of the interplea.

3. ———: ———: ———: ———. A justice of the peace in an attachment proceeding struck out a wife's interplea claiming the exempt property of her absconding husband, and rendered judgment in the attachment suit for the plaintiff. The wife then appealed to the circuit court. *Held,* the judgment of the justice could not prejudice or impair the wife's full right to claim the exemptions, though the attachment was based among other things upon the non-residency of the husband.

4. **Attachment:** ABSCONDING: NON-RESIDENCY. One may abscond or absent himself from his place of abode without becoming a non-resident.

5. **Practice, Appellate:** INSTRUCTIONS: EVIDENCE NOT IN ABSTRACT. The evidence not being presented in the abstract the appellate court will not review the action of the trial court in refusing certain instructions as embracing in their hypotheses certain facts of which there was no evidence.

Appeal from the Hickory Circuit Court.—HON. W. I. WALLACE, Judge.

AFFIRMED.

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T. G. Rechow and *F. M. Wilson*, for appellant.

The wife cannot interplead for the husband's property. *Withers v. Shropshire*, 15 Mo. 632; *Abernathy v. Whitehead*, 69 Mo. 28. A married woman, when she claims the property exempt as the husband's, claims it as his vice, and she can no more interplead than could he. The property still remains that of the husband. *Steele v. Leonori*, 28 Mo. App. 675; *State ex rel. v. Chaney*, 36 Mo. App. 513; *State ex rel. v. Laies*, 46 Mo. 108. She certainly cannot claim and hold his exemption when he is personally present as in this case.

Wm. L. Pitts and *W. G. Robertson*, for respondent.

(1) The wife of an absconding debtor can claim and recover exempt property. Revised Statutes, 1889, sec. 4908. The wife can claim the exemptions when the husband fails to do so. Revised Statutes, 1889, sec. 6864. (2) Any person claiming attached property may interplead. Revised Statutes, 1889, secs. 572, 5256; *Wolf v. Vette*, 17 Mo. App. 36. (3) Any person who can maintain replevin, trover or trespass can interplead. *Furniture Co. v. Raddatz*, 28 Mo. App. 210. Interplea is, like the action of replevin, purely a possessory action. *Spooner v. Ross*, 24 Mo. App. 599; *State ex rel. v. Burker*, 26 Mo. App. 487; *Burgert v. Borchert*, 59 Mo. 80; *Mansur v. Hill*, 22 Mo. App. 372. (4) It is not the mere allegation of non-residence in an affidavit for attachment that determines the right of the wife to claim and recover property exempt under the law, but the truth of such allegation. *Griffith v. Bailey*, 79 Mo. 472; *Steele v. Leonori*, 28 Mo. App. 675. (5) The interpleader was entitled to a speedy trial upon her interplea filed before the justice, and before the trial and judgment in the attachment suit.

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Revised Statutes, 1889, sec. 572; *Mfg. Co. v. Bean,* 20 Mo. App. 111. (6) Interpleader being entitled to the possession of the property as against the constable and the plaintiff in the attachment suit, on the day she filed her claim with the justice on January 31, 1891, the fact that her husband had returned from Cole county, and was present when this cause was tried in November, 1891, can in nowise affect her right to recover in this case. *Donohoe v. McAleer,* 37 Mo. 312; *Pace v. Pierce,* 49 Mo. 393.

Smith, P. J.—The plaintiff sued Thomas Dixon, the defendant, by attachment before a justice of the peace, alleging in his affidavit as grounds therefor those provided in subdivisions 4 to 5 and 8 of section 521, Revised Statutes. The constable under the writ seized a certain quantity of corn and oats, and also a wagon and harness.

Thereupon the interpleader, who was the wife of the defendant, appeared before the justice and filed an interplea claiming therein that the defendant had absconded and absented himself from his usual place of abode in Hickory county, in this state, and that the property seized by the constable was then exempt from levy and seizure under the attachment writ, and that she was entitled to the possession thereof, and praying for an order on the constable to set off and turn over to her the possession of the property, etc. Thereupon the plaintiff amended his affidavit for the attachment by inserting another ground for the attachment, to-wit, "that the defendant is a non-resident of the state."

The plaintiff then next filed a motion to strike out the interplea, alleging as grounds therefor that the *first* said interplea states no cause of action; *second,* the wife of a defendant cannot interplead; *third,* said interplea does not allege any ownership in the prop-

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erty interpleaded for; *fourth*, according to the allegation in said interplea she can have no ownership in said property; *fifth*, the defendant was proceeded against as a non-resident of the state, and such fact not having been controverted; *sixth*, under the allegation in the affidavit for attachment no exemption as claimed in said interplea can exist, either in defendant or his wife, the interpleader; *seventh*, said affidavit was confessed, and the court was bound to find the allegations therein as true. The justice sustained this motion, and then entered judgment in the attachment suit for the plaintiff. The interpleader thereupon took an appeal to the circuit court, when the plaintiff renewed his motion to strike out the interplea, which was by the court overruled. There was a trial on the interplea which resulted in judgment for the interpleader, from which the plaintiff has appealed.

The appealing plaintiff complains of the action of the circuit court in overruling his motion to strike out the interplea. In this action of the court no error is perceived.

As to the first ground of the motion, it may be observed that section 4908, Revised Statutes, provides that when the articles mentioned in the first, second, third, fourth, fifth, sixth, ninth and tenth clauses of section 4903 of the statute shall belong to a married man, and he, at the time the execution is levied or at any time before sale under it, has absconded or absented himself from his place of abode, his wife may claim said articles, or in lieu of the provisions mentioned in the first and second subdivisions of said section 4903 may select and hold exempt from execution or attachment any other property, not exceeding in value $300, and may receive the same or any other articles mentioned in chapter 63, Revised Statutes, from the officer, and may, if said articles are taken or with-

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held from her, *in her own name sue for and recover the same* or the value thereof. And the wife may, we think, hold any property seized in lieu of that mentioned in the first and second subdivisions of section 4903, although the husband does not own the property specified in these subdivisions. *State v. Tilden*, 73 Mo. 37; *Paddock v. Lance*, 94 Mo. 283.

The property levied upon, it was conceded, was only of the value of $143. The wife's right to claim the exemption of this amount of property, under the conditions mentioned in section 4908, cannot be questioned, unless precluded by the provisions of section 539 of the statute, which provides that no property or wages declared by statute to be exempt from execution shall be attached except in case of a non-resident defendant or of a defendant who is about to move out of the state with the intent to change his domicile. Either of these facts, when established, would avoid and defeat the wife's claim to the statutable exemptions.

As the issues arising on the interplea must invariably be determined before a judgment in the attachment can be rendered (*Mfg. Co. v. Bean*, 20 Mo. App. 111; *McElfratrick v. McCauly*, 15 Mo. App. 102), it is plain that the bare allegation of either of these facts in the affidavit for the attachment concludes no one in the trial of the issues on the interplea. There can regularly be no adjudication of these precluding facts in the attachment suit in advance of the trial and judgment on the interplea.

We do not think that even though the facts mentioned in section 539 are made the grounds of attachment, that this of itself necessarily bars the wife's claim to her exemption in the trial on the interplea. If such is the ground of the attachment, the establishment of that fact on the trial of the issues on the interplea would undoubtedly defeat the claim to the property. The

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justice by rendering judgment in the attachment before the trial *de novo* on the interplea could not prejudice or impair the wife's full right to claim the exemptions allowed by the statute. We think the interplea *prima facie* stated a legal claim to the exemption.

The second ground of plaintiff's motion may be disposed of by stating that by the express provisions of the statute, sections 4908 and 572, the right of the wife to sue for and recover the exempt property is clearly given. And, as to the third and fourth grounds of the motion, it is sufficient to say that the interplea states all the facts essential to entitle the interpleader to the beneficent provisions of the statute she invokes.

The plaintiff's fifth ground of objection has been already sufficiently noticed, We may add, however, that the mere fact alleged in the affidavit that defendant was "a non-resident of this state," though not in any way controverted by defendant, could not of itself constitute a conclusive bar to the interpleader's right of exemption available to plaintiff in the trial of the issues on the interplea. And this last remark is applicable to the plaintiff's sixth ground of objection to the sufficiency of the interplea.

As to the plaintiff's last objection, we may state that there is nothing in the interplea which lends support to the idea that it confesses the allegation of the affidavit that defendant was not a resident of this state. The defendant could abscond or absent himself from his place of abode without becoming a non-resident of the state. The former is not necessarily a resulting consequence of the latter.

No point is made in the plaintiff's brief in respect to the giving or refusing of instructions. Those given for the interpleader seem to be substantially correct. The instructions asked by the plaintiff embrace in their hypotheses certain facts of which there is no evidence.

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The evidence not being presented by the abstract in any form, we are not at liberty to undertake a review of the action of the court in refusing the same.

The judgment must be affirmed. All concur.

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THE STATE *ex rel.* S. L. NORTH, Appellant, v. SAMUEL HADLOCK *et al.*, Respondents.

Kansas City Court of Appeals, January 2, 1893.

1. **Sheriffs:** ORDER OF SALE: GOODS OF STRANGER. If a sheriff on an attachment writ against A seize the property of B, and if the court where the cause is pending shall order a sale of the property as perishable, and the sheriff sell thereunder, he will be liable to B on his official bond.

2. **Attachment:** ORDER OF SALE: PROCEEDING IN REM: VALID TITLE. Attachment is not a proceeding *in rem*, and does not bind a stranger thereto, but the proceeding therein which results in the sale of the attached property *pendente lite* is a proceeding *in rem* which confers a valid title on the purchaser, but the sheriff cannot shelter himself behind such title.

Appeal from the Polk Circuit Court.—HON. W. I. WALLACE, Judge.

REVERSED AND REMANDED.

Wallace Pratt and *J. C. Cravens*, for appellant.

(1) Plaintiff's demurrer to the answer of the defendants, which merely attempted to avoid plaintiff's cause of action, should have been sustained. The facts stated in said plea were wholly insufficient to constitute a defense. *Young v. Kellar*, 94 Mo. 597; *Vaughan v. Allgaier*, 27 Mo. App. 527; *Vaughan v. Fisher*, 32 Mo. App. 35; *Buller v. Woods*, 43 Mo. App. 494. (2)

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Although a sheriff may, by the seizure of the property of a stranger to the writ, vest the court with jurisdiction over it, he and his sureties are nevertheless liable in trespass, or trover to the real owner for the damages sustained. Drake on Attachment [5 Ed] sec. 196; *State ex rel. v. Hope*, 88 Mo. 430; *State v. Moore*, 19 Mo. 369; *State v. Fitzgerald*, 64 Mo. 185; *State ex rel. v. Koontz*, 83 Mo. 323. (3) The portion of the defendants' answer complained of is wholly insufficient under our practice. It states no facts, but legal conclusions only. The statute requires "a statement of any new matter constituting a defense, in ordinary and concise language, without repetition." Revised Statutes, secs, 541, 2049; *Northup v. Ins. Co.*, 47 Mo. 435; *Kersey v. Garton*, 77 Mo. 647; *Newham v. Kenton*, 79 Mo. 387; *Musser v. Adler*, 86 Mo. 449.

Upton & Skinker, for respondents.

(1) The defendants' answer stated a good defense. None of the authorities cited by appellant are against this position, and, so far as they touch this case, they support us. (2) Appellant's second proposition and his authorities in support thereof is entirely irrelevant to the issues raised by the demurrer in this case. (3) Defendants' answer does not state mere conclusions of law, but clearly states facts sufficient to constitute a defense. In pleading a judgment or order of court it is not necessary to state the facts conferring jurisdiction. Revised Statutes, 1889, sec. 2079; *Wickersham v. Johnson*, 51 Mo. 313. The answer was good on demurrer, and, if at all defective, its defects should have been reached by a motion to make more definite. Bliss on Code Pleading [1 Ed.] sec. 213.

Gill, J.—Relator North brought suit against defendant Hadlock (sheriff of Polk county) and the

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sureties on his official bond, for damages alleged to have been sustained by reason of the wrongful seizure and sale of a certain lot of railroad ties belonging to the plaintiff, and which had been levied on by said sheriff in an action to which said relator was not a party.

The answer consisted of two counts; the first being a general denial, and the second as follows: After admitting that at the date of the alleged seizure Hadlock was sheriff, "defendants say that said Hadlock, as such sheriff, received from the clerk of the circuit court of Cedar county, Missouri, a duly certified copy of an order of sale, commanding him to sell the ties mentioned in plaintiff's petition, the same then being in the lawful custody of said circuit court of Cedar county, Missouri, and that by virtue of such order of sale he did on the first day of June, 1888, sell said ties as he was in duty bound to do."

To this last count plaintiff demurred, on the ground that it stated no defense. The demurrer was overruled, and, in the absence of a reply, the court entered judgment for defendants, as appears by the following judgment: "Now come the parties hereto by their respective attorneys, and this cause coming on for trial before the court upon the pleadings herein, and the plaintiff offering to prove the allegations of his petition, and the defendant having filed his answer, setting up new matter in justification, which is unreplied to, and the plaintiff having filed a demurrer to said portion of the answer, which demurrer is by the court overruled, and the plaintiff declining to plead further in this case, the court finds for the defendant upon the pleadings. It is, therefore, considered by the court," etc. From this judgment plaintiff appealed.

The action of the lower court—both in overruling the demurrer, and in giving judgment for defendants

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on the face of the pleadings—was clearly erroneous. The theory adopted by the trial court amounts to this: If the sheriff on an attachment writ against A should seize the property of B, and if the court where the cause is pending shall order a sale of the property as perishable, then the execution of said order will deprive the true owner of his right of action against the sheriff for such wrongful levy. There is no rule of law that will justify this proposition.

While it is true the courts hold, where attached property is sold under an order of court, because of its perishable nature, that the purchaser takes a title good against the world (*Young v. Kellar*, 94 Mo. 581; *Buller v. Woods*, 43 Mo. App. 494), yet no case has gone so far as to say that such a sale of the attached property would take away the rights of a third party to sue the sheriff in trespass for having wrongfully levied on and sold his goods to satisfy the debt of another. It does not follow because a purchaser of the attached goods (sold under order of court because likely to perish during the litigation) gets a perfect title that, therefore, the property belonged to the attachment debtor. The title in that state of case is made to pass *ex necessitate rei*, and as a proceeding *in rem*. The true rule is thus declared in a Pennsylvania case, cited with approval in *Young v. Kellar, supra:* "Where cattle belonging to one person had been seized under attachment as the property of another person, sold on *mesne* process as perishable property, and the real owner brought trespass against the sheriff, it was held that he could maintain the action; that the proceeding by attachmnnt was not a proceeding *in rem*, and did not bind the plaintiff, but that the proceeding which resulted in the sale of the attached property *pendente lite* was a proceeding *in rem*, which conferred a valid

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title on the purchaser, *though the sheriff could not shelter himself behind the valid title there acquired.*"

The judgment, therefore, of the circuit court must be reversed and the cause remanded. All concur.

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William H. Rhoades, Defendant in Error, v. W. A. McNulty, Plaintiff in Error.

Kansas City Court of Appeals, January 2, 1893.

1. **Practice, Trial:** EVIDENCE: JURY QUESTION. Where there is evidence sufficient to support a verdict for or against any issue, such issue is properly submitted to the jury.

2. **Replevin:** PLAINTIFF'S OWN TITLE. A plaintiff in replevin should recover on the strength of his own right and not that of a third party.

3. ———: PARENT AND CHILD: GUARDIAN: THEORY OF PLEADING AND RECOVERY: INSTRUCTIONS. A father is the natural guardian of his minor son, and is entitled to the possession of the son's personal property which came to the son through him, and may sue for the same, in which case the pleading should show his claim to be that of guardian; and the theory of the complaint and trial cannot, by the instructions, be changed from his individual right to his representative capacity.

4. ———: CUSTODIA LEGIS: DELIVERY BOND: DISMISSAL. On the service of a replevin writ defendant gave a delivery bond for the return of the property on the return day of the writ; before that day the suit was dismissed. *Held,* the property did not remain in the custody of the law until the return day of the writ as it would, had plaintiff retained possession thereof.

5. ———: PRIOR PENDING ACTION: CERTIFICATE OF JUSTICE: BURDEN OF PROOF. Where it appears a prior action was begun between the same parties over the same property it devolves on the plaintiff to show by a preponderance of the testimony that that action was discontinued before the one on trial was instituted; where two certificates of the justice are conflicting as to the date of the dismissal of the former suit, the preponderance would not seem to be with the plaintiff.

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Error to the Pettis Circuit Court.—HON. RICHARD FIELD, Judge.

REVERSED AND REMANDED.

Jackson & Montgomery, for plaintiff in error.

(1) Plaintiff could only recover on the right he had at the commencement of the action. *In re Ass'n*, 12 Mo. App. 40; *Weinwick v. Bender*, 33 Mo. 80; *McDowell v. Morgan*, 33 Mo. 555. A plaintiff to maintain replevin must have in himself the right of property, general or special, coupled with the right of immediate possession. *Andrews v. Costigan*, 30 Mo. App. 29; *Updyke v. Wheeler*, 37 Mo. App. 680; *Gartside v. Nixon*, 43 Mo. 138. (2) For the same reason the court erred in refusing defendant's third instruction, as asked. (3) There was also error in refusing defendant's seventh instruction. It was drawn upon the issue as made by the answer and reply, and sustained by evidence in the case, and was a correct declaration of the law upon that theory of the case. (4) The property was in *custodia legis*, while held by virtue of the delivery bond given in the suit in St. Louis, and was not subject to another levy. *Fleming v. Clark*, 22 Mo. App. 218; *Metzner v. Graham*, 57 Mo. 404; *Bank v. Owen*, 79 Mo. 429; *State ex rel. v. Colvin*, 80 Mo. 61. The plaintiff did not have the right to dismiss his first replevin suit, and the attempt to do so did not terminate it. *Collins v. Hough*, 26 Mo. 149; *Berghoff v. Heckwolf*, 26 Mo. 511; *Ranney v. Thomas*, 45 Mo. 111. The attempted dismissal by plaintiff did not affect the jurisdiction of the court over the property. Cobbey on Replevin, sec. 1193. (5) The first suit being still pending and undetermined at the time the second suit was com-

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menced, the first was a bar to the second. The retaining the property under bond did not affect the title, nor the right to set up the pendency of the other suit. *Turner v. Reese*, 22 Kan. 319.

Wilbur S. Jackson and *Sangree & Lamm*, for defendant in error.

(1) Replevin being a purely possessory action, the right to possession is the gist of the matter, and the plaintiff, as the father and natural guardian of his minor son, had the right to the custody of the minor's property where it was derived from him, and could, therefore, maintain replevin for the mare even if she belonged to the son. Revised Statutes, sec. 5279; *McCarty v. Rountree*, 19 Mo. 345; *Sherwood v. Neal*, 41 Mo. App. 416; *Smith v. Williamson*, 1 H. & J. (Md.) 147; *Newman v. Bennett*, 23 Ill. 347; Wells on Replevin, sec. 643; Cobbey on Replevin, sec. 423; *Bliss v. Badger*, 36 Vt. 338. (3) The seventh instruction asked by defendant and refused was in substance his first instruction over again. When the court gave the latter he had no use for the former. It was, therefore, properly refused on that account. Besides it was not the law of the case. It ignored all questions of fraud and the wrongful getting of possession by McNulty. (3) Where A brings replevin against B, and B retains the property under a delivery bond and A dismisses his suit, it leaves the parties precisely *in statu quo*. The rule in such a case is different than where A had got and held the property by his first writ. Cobbey on Replevin, sec. 1197. Where the reason of the law ends the law itself ends. (4) The mare belonged to W. H. Rhoades. This was plaintiff's theory. He did not abandon it at the trial nor does he now. The second instruction of plaintiff is based on that theory.

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If no general instruction was asked by plaintiff on that phase of the case, it was because defendant himself asked and was given full instructions thereon, and it was not necessary to incumber the record or confuse the jury with any more. (5) "Replevin suits are *sui generis*, and the inclination of the courts of this state has been to give them a flexibility sufficient to meet all exigencies and adjust all equities arising in such actions." *Hickman v. Dill*, 32 Mo. App. 509; *Gregory v. Tavener*, 38 Mo. App. 627. They have even announced the doctrine that mere lawful possession alone will support the action against anyone who does not show a better title. *Summers v. Austin*, 36 Mo. 307; *Weeks v. Etter*, 81 Mo. 375; *Smith v. Lydick*, 42 Mo. 209; 2 Greenleaf, sec. 637.

ELLISON, J.—This is an action of replevin for a mare, begun in Pettis county. Plaintiff recovered below and defendant appeals.

Defendant, after purchasing the mare in Pettis county (as he claims), shipped her to St. Louis where plaintiff replevied her before a justice of the peace on the ninth of October, 1889. In that case defendant retained possession of the animal by executing a forthcoming bond. Afterwards, before return day (the date being in dispute), plaintiff dismissed his action. Defendant having in the meantime returned to Pettis county with the mare, plaintiff instituted the present action. It is not improper, from the record, to say that defendant makes three principal claims against plaintiff's recovery: *First*, that he purchased the mare from plaintiff; *second*, that the testimony shows plaintiff has no right to recover, since the mare appears to be the property of his minor son; and, *third*, that the present suit was instituted in Pettis county before the dismissal of the suit in St. Louis, or, at least, before the prop-

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erty had ceased to be in the custody of the St. Louis court. There are other contentions advanced following from these and which we will notice herein.

In the first place we will say that there is testimony in the cause sufficient to submit the question to the jury as to whether there had been a sale of the mare by plaintiff, and there was also testimony sufficient to justify the giving of instruction number 2 on the part of plaintiff in relation to fraud in procuring possession of the mare from plaintiff in the first instance. The testimony is quite lengthy, and we have given it careful consideration; arriving at the conclusion that there is evidence from which the verdict of a jury could be sustained which found for or against a sale, or for or against the fraudulent acquisition of possession by defendant.

There is also evidence abundant to justify a jury in believing either that the mare was the property of plaintiff, or of his minor son. And in this state of the evidence the court gave an instruction authorizing the jury to find for the plaintiff notwithstanding they might believe the animal was owned by his son. This was an erroneous direction. A plaintiff in replevin should recover on the strength of his own right and not that of a third party. *Teichman v. Bank*, 27 Mo. App. 676, 683; *Updike v. Wheeler*, 37 Mo. App. 680; *Easter v. Fleming*, 78 Ind. 116; *Lane v. Sparks*, 75 Ind. 278; *Goodman v. Kennedy*, 10 Neb. 270; *Reinheimer v. Hemingway*, 35 Pa. St. 432; *Johnson v. Neal*, 6 Allen, 227; *Hamilton v. Bank*, 40 Iowa, 307.

But plaintiff contends that the instruction may be sustained since plaintiff is the father and natural guardian of the son referred to in the instruction, and as such was entitled to the possession of the property which became the son's through the father. It is quite

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true that in such case the father is the natural guardian, and as such would be entitled to the possession of the personal property of his minor son which came to the son through him (*Sherwood v. Neal*, 41 Mo. App. 416) and would be entitled to sue for the same. But in such case the pleading or complaint should show the nature of the claim. If he sues as guardian it should be so stated. We think this is established by the following authorities: *Higgins v. Railroad*, 36 Mo. 418; *Headlee v. Cloud*, 51 Mo. 301; *State to use of Tapley v. Matson*, 38 Mo. 489; *State to use, etc., v. Bartlett*, 68 Mo. 581. The complaint here and the whole theory of plaintiff's case, before reaching the instructions, was that he was individually entitled to the property as distinguished from his right in a representative capacity. The instruction referred to should have been refused and number 3, offered by defendant, asserting a contrary proposition, should have been given as offered without amendment.

Instruction number 7, offered by defendant, should have been given. It is based upon testimony in the cause going to show that plaintiff authorized his minor son to make the sale of his, plaintiff's, mare to defendant's agent.

This brings us to the very important part of this cause relating to the dismissal of the case in St. Louis and instituting the present action. Defendant contends that notwithstanding that the plaintiff may have undertaken to dismiss his case in St. Louis before the commencement of the present action, and that such dismissal was noted on the justice's docket, that still, since the defendant gave a delivery bond conditioned for the return of the property at the return day of the writ, the property was in *custodia legis* until that time;

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that the plaintiff could not, at his own volition, terminate the case as against the rights and interests of the defendant. This contention of defendant would be valid if the plaintiff had retained the possession of the property under his writ, but he did not; for, as stated, the defendant retained the possession by giving a delivery bond under the provisions of the statutes. The dismissal of the suit, then, left defendant in possession and excused or made unnecessary a compliance with the condition of the bond to return the property. Such seems to be the law. Cobbey on Replevin, sec. 1197.

But there is a serious question in this connection as to the proof of the time when the action begun in St. Louis was dismissed. There were two certificates of the justice before whom the case was instituted, both apparently equally regular. One offered by plaintiff showed the case dismissed before the present action was begun, and the other offered by defendant *after* it was begun. Since it appeared that there was a prior action begun between the same parties over the same property, it devolved on plaintiff in order to sustain himself to show by a preponderance of the testimony that that action was discontinued before the present one was instituted. With two certificates before them equally regular, and neither impeached in any way, we are at a loss to know how the jury made choice, and it seems they should have found against the plaintiff on whom the *onus* was. But they did not, and since this is a matter which must necessarily be capable of definite ascertainment, we will not refuse to remand the cause. The judgment is, therefore, reversed and the cause remanded to be proceeded with as herein indicated. All concur.

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N. B. FROST, Appellant, v. ED. F. TRACY, Respondent.

Kansas City Court of Appeals, January 2, 1893.

Principal and Agent: CONTRIBUTION. Plaintiff and defendant were co-sureties on two promissory notes, on one of which judgment was obtained against both, and on the other against plaintiff only. Executions were levied on plaintiff's land, which plaintiff then conveyed to defendant in consideration of his satisfying the executions, which he did. *Held*, plaintiff's land paid the judgments, and defendant must contribute his half of the debt to plaintiff. *Held, further*, the deed and agreement was not a final settlement between the co-sureties, nor a new contract superseding their prior relations and constituting a bar to the contribution.

Appeal from the Johnson Circuit Court.—HON. CHAS. W. SLOAN, Judge.

REVERSED AND REMANDED *(with directions)*.

J. W. Suddath and *Samuel P. Sparks*, for appellant.

(1) That one surety is liable to his co-surety for contribution, where payment is made under any sort of legal compulsion, is fundamental. *Skrainka v. Rohan*, 18 Mo. App. 343. (2) The consideration in the deed was the $5 mentioned, and the face of the two judgments mentioned and costs amounting to $2,005. *Fitzgerald v. Baker*, 13 Mo. App. 192; *Heim v. Vogel*, 69 Mo. 529; *Klein v. Isaacs*, 8 Mo. App. 568. (3) The consideration expressed in the deed, to-wit, the $5 and the two judgments assumed and costs, is the *prima facie* value of the land. Martindale on Conveyancing, sec. 79, p. 73; *Allen v. Kennedy*, 91 Mo. 324–328; *Hasenritter v. Kirchoffer*, 79 Mo. 329.

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O. L. Houts, for respondent.

(1) While the plaintiff and defendant occupied the relation of co-sureties, plaintiff could have recovered of defendant in an action at law by reason of this relation whatever he had been compelled to pay in excess of his due proportion of the original demand and cost. *Vanhetten v. Richardson*, 68 Mo. 379. (2) It was competent for the plaintiff and defendant at any time after the execution of the notes upon contracts with sufficient consideration to settle the mutual obligations between them or to change their relation toward each other so that they would no longer be co-sureties. *Burnside v. Fetzner*, 63 Mo. 107; *Druhe v. Christie*, 10 Mo. App. 566. (3) This is an action upon a promise which the law creates between co-sureties for contribution. The deed of date February 6, 1889, executed by plaintiff and accepted by defendant, operated as and constituted a contract and settlement between the parties. (4) The suit is not upon the deed or any contract or obligation growing out of it. If at the time the deed was delivered, in consideration therefor, the respondent had agreed to pay the $5, the judgments, and to pay to appellant, then or some other time, one-half of the judgments, appellant should have so stated in his petition, and made proof thereof in order to recover.

Ellison, J.—Plaintiff and defendant were sureties for a principal on two promissory notes. The holder of the notes obtained judgment against the plaintiff and defendant on one of the notes, and against plaintiff only on the other note. Execution was issued on both judgments, and levied upon one hundred and eighty-three acres of land belonging to this plaintiff. Before the day of sale plaintiff conveyed this land to

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this defendant, his co-surety, reciting in the deed a consideration of $5, and the following: "By accepting this deed the said Edward F. Tracy assumes the payment of two judgments against this grantor in the circuit court of Johnson county, Missouri, one in favor of John T. Cheatham for the sum of about $1,000, and one in favor of John Newton for the sum of about $1,000, together with the costs thereon."

Defendant, in compliance with this, did pay off the judgments, and the executions were called in. Plaintiff has instituted this suit to compel defendant, as his co-surety, to pay to him one-half of said judgments, basing his action on the theory that, in effect, he has paid all due on the judgments when, as between him and defendant, he should only pay one-half. Judgment was rendered for defendant below, and plaintiff appeals.

There is no doubt that originally, as between themselves, the plaintiff and defendant were each liable for one-half the judgments, and that, if either paid the whole sum, the other should contribute to him the one-half thereof. The question then is, did plaintiff, by the transaction detailed above, pay the whole amount of the judgments? There is no oral evidence of the understanding of the parties or of any agreements between them, aside from what has been set forth. The record of the suits on the notes, judgments, executions and levies thereunder together with the deed, and the conceded fact that the defendant paid the judgments, is all that appears in the case. From this we are satisfied that plaintiff is entitled to recover. As between these parties, nothing else appearing, we must assume that the consideration in the deed from plaintiff to defendant represented the value of the land. Therefore, plaintiff has given of his own property to defendant, that which is equal in

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value to the whole amount of the judgments, with the understanding that he was to pay these judgments. If he had given him that much money with which to pay the judgments, no question could arise as to his right to recover. If the agreement had been that defendant was to transfer the land conveyed to him by plaintiff to the judgment creditor in satisfaction of the judgments, it would seem also to be plain that he should recover. So if plaintiff had conveyed the land to a third party, as illustrated by counsel, with the understanding that such third person should pay or satisfy the judgments, it would have been a satisfaction by him out of his own property, and certainly defendant would be liable to him for one-half. These illustrations point to the one result, and are no more than if plaintiff had suffered his lands to be sold as they were levied upon and they had brought the amount of the judgments. They all show that plaintiff's property has satisfied the whole debt for which he was only liable for half, as between him and this defendant. The defendant has received $2,000 worth of property of plaintiff, and has paid out for plaintiff only $1,000. He yet has the other $1,000.

But defendant's position is: *First.* "That this deed and agreement, of which it is evidence and the only evidence, was a voluntary and final settlement, founded upon consideration between plaintiff and defendant, of all matters between them growing out of their prior relations as co-sureties, and after defendant paid the judgment and costs he had performed the only and final obligation resting on him to plaintiff growing out of this prior relation and this subsequent agreement; and that plaintiff cannot recover therefor in this action or in any other." *Second.* "Whether the payment of these judgments and costs by Mr. Tracy was the final and only obligation resting upon him towards plaintiff or not, the new contract and deed was from the time

of its date the measure of the right, obligation and remedy then existing between plaintiff and defendant, and any action brought must be based on the new contract, which completely superseded the prior relation of co-sureties between the parties, and the obligation and remedies arising therefrom, and is a complete bar to this suit." We have considered this contention in all its bearings, and find ourselves unable to sustain it on the case presented. The judgment will, therefore, be reversed, and cause remanded with directions to circuit court to enter judgment for the plaintiff. All concur.

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THE STATE OF MISSOURI *ex rel.* RUBEN S. LANYON, Relator, v. THE JOPLIN WATER WORKS *et al.*, Appellants.

Kansas City Court of Appeals, January 2, 1893.

1. **Construction:** ORDINANCE: WATER WORKS MONOPOLY. An ordinance, giving the defendant corporation exclusive right to operate a system of water works in the city, fixed the maximum rate at twenty-five cents per thousand gallons, approximated at so much per annum for dwellings, etc., provided the party requiring a meter should pay the expense of the same. Plaintiff piped his dwelling, put in the most approved meter, tendered the necessary charges to the company. *Held,* it was the company's duty to turn on the water.

2. **Mandamus:** CORPORATION PERFORMING A PUBLIC FUNCTION. Where a citizen complies with all the requirements of the ordinance granting as a franchise to a corporation the exclusive right to discharge certain duties, as furnishing water, and the corporation refuses, *mandamus* will lie to compel the performance of the duty, there being the presence of a specific legal right and the absence of an effectual legal remedy.

3. ———: VARIANCE BETWEEN ALTERNATIVE AND PEREMPTORY. A peremptory writ can go no further nor vary in any substantial particular the alternative, but such departure must be material to be fatal.

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Appeal from the Jasper Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED

Cunningham & Dolan, and *Galen, Spencer & Spencer*, for appellants.

(1) *Mandamus* is not the proper remedy. *State ex rel. v. Trustees*, 115 Ind. 480; s. c., 16 N. E. Rep. 811. It cannot be said that the contract to furnish the inhabitants of the city of Joplin with water imposes a public duty upon the defendant company, any more than rests upon a turnpike company, bridge company, railroad company or any other common carrier; and yet, as applied to all of these, it has been held that *mandamus* will not lie to compel the performance of an alleged duty, and especially so at the suit of an individual. *State v. Turnpike Co.*, 16 Ohio St. 308; *State v. Railroad*, 43 N. J. L. 505; *State v. Bridge Co.*, 20 Kan. 404; *People v. Dulany*, 96 Ill. 503; High on Extraordinary Legal Remedies, sec. 321. (2) A peremptory writ of *mandamus* should not be granted unless the relator shows a clear right to the remedy which he asks. *State ex rel. v. Buhler*, 90 Mo. 560; *State ex rel. v. Flad*, 26 Mo. App. 500; Merrill on Mandamus, sec. 12; *State v. Railroad*, 42 La. Ann. 138; 4 Wait's Actions & Defenses, sec. 11, p. 382; High on Extraordinary Legal Remedies, secs. 9, 277, 278, 290, 320, 321; *State ex rel. v. Tel. Co.*, 22 N. W. Rep. 237; *State ex rel. v. Tel. Co.*, 36 Ohio St. 296. (3) Section 14, upon which relator relies, should be construed according to the manifest intention of the parties thereto, as gathered from reading the whole, which intention is that for the purposes enumerated in the schedule therein water should be supplied at the rates

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there set forth, and according to said schedule; and that only when water was used for purposes not therein specifically enumerated the rates should be determined *pro rata* by meter measurement; and the relator, not wanting to use water for any other purpose than therein specified, he is not entitled to have it furnished him by meter measurement. *Shelty v. Bailey*, 40 Mo. 69; *People v. Casper*, 3 Neb. 285; *Cook v. Bow*, 39 Conn. 296; *Miller v. Waggonhauser*, 18 Mo. App. 11; *State ex rel. Cannon v. May*, 106 Mo. 488; *State v. Bryant*, 90 Mo. 534; *Vaugh v. Porter*, 11 Vt. 266; *Baxter v. State*, 9 Wis. 38–45; *Terrence v. McDougal*, 12 Ga. 526; Webster's Dictionary, "Approximate;" Rapalje & Lawrence's Law Dictionary; *Williamson v. McClure*, 37 Pa. St. 402; *Tracy v. Chicago*, 24 Ill. 500; *Ex parte Joffee*, 46 Mo. App. 269. (4) The peremptory writ does not conform strictly to the alternative writ. More is granted by the peremptory writ than is demanded by the alternative writ. *State ex rel. v. Beyers*, 41 Mo. App. 503; *State ex rel. v. Field*, 37 Mo. App. 101; *People v. Brooks*, 57 Ill. 142; *State v. Railroad*, 59 Ala. 321; *Cross v. Railroad*, 34 West Va. 742; *Hartshorn v. Elsworth*, 60 Me. 276. "The rule has always been that the peremptory writ must conform strictly to the alternative writ." *State ex rel. v. Railroad*, 77 Mo. 147.

J. W. McAntire, for respondent.

(1) *Mandamus* is the proper remedy to compel the water company to perform its duty to the inhabitants of the city. 2 Beach on Private Corporations, secs. 834, 835, 836; 2 Morawetz on Private Corporations, secs. 1132, 1133, and authorities therein quoted; *State ex rel. v. Railroad*, 86 Mo. 13; *Easton v. Water Co.*, 97 Pa. St. 554; *State ex rel v. Everett*, 52 Mo. 89; *Rail-*

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road v. Morgan Co., 53 Mo. 156; 61 Mo. 158; 73 Mo. 161; *State ex rel. v. Railroad*, 77 Mo. 148. (2) A substantial compliance of the peremptory writ with the alternative is all that is required. *State ex rel. v. Mayor*, 36 Mo. App. 550; *State ex rel. v. Francis*, 95 Mo. 44; *Munn v. Illinois*, 94 U. S. 113; *Water Co. v. Bryant*, 52 Cal. 132; *Water Co. v. San Francisco*, 52 Cal. 111; *Water Works v. Bartlett*, 63 Cal. 245; *Lumbard v. Stearns*, 4 Cush. 60; *Water Works v. Schottler*, 110 U. S. 347, 354; *Dayton v. Quegley*, 29 N. J. E. 77; 2 Stew. 1878; Morawetz on Private Corporations, sec. 1132; *Gaston v. Water Co.*, 97 Pa. St. 584. (3) The ordinance should be construed according to the intent of the parties, and if this can be ascertained by the acts and conduct of the parties such interpretation should prevail. *Brewing Co. v. Water Works*, 34 Mo. App. 50; Dillon on Municipal Corporations, sec. 420; *Matheisas v. Danchy*, 26 Mo. App. 660; *Belch v. Miller*, 32 Mo. App. 387; 4 Dillon on Municipal Corporations, secs. 319, 321, 322, 323, 325, 326; *State ex rel. v. Francis*, 95 Mo. 44.

Gill, J.—The defendant water company, at the beginning of this suit, owned and operated a system of water works in the city of Joplin, wherein it had an exclusive right under and by virtue of an ordinance of said city. Section 14 of this ordinance attempts, as far as may be, to prescribe the rates or charges for consumers. It reads as follows: "Sec. 14. The water rates to consumers shall not exceed twenty-five cents per one thousand gallons, or one cent per barrel, approximated for the several purposes, as follows." Then appears a schedule of prices per annum for dwellings (so much per room), hotels, offices, stores, bakeries, saloons, butcher shops, soda fountains, water closets, etc., concluding with this clause: "Rents for all purposes not hereinbefore enumerated will be

fixed by estimate or meter measurement at a rate *pro rata* to quantity used, not exceeding in any instance twenty-five cents per one thousand gallons, or one cent per barrel; provided, however, that the party requiring the meter must pay the expense of the same."

Plaintiff Lanyon erected at Joplin a family residence, and provided the same with the necessary pipes, etc., to supply it with water from the defendant's mains. He also put in at his own expense a meter of the most approved design. Lanyon then applied to the water company to turn in the water through his meter and into his dwelling, accompanying his application with a tender of the necessary prepayment of charges. The water company declined to supply water to be measured and paid for according to the meter, but did offer to let in water if plaintiff would pay according to the schedule of approximated prices. Thereupon Lanyon brought this action in *mandamus* to compel the company to turn on the water and supply his premises according to the meter rates. At the final hearing the circuit court awarded a peremptory writ as prayed by plaintiff, and defendant appealed.

This case must turn on the proper construction of section 14 (above quoted from) of the ordinance which grants the defendant its exclusive franchise to operate water works in Joplin. The defendant takes the position that it is obliged under the terms of that section to supply water to residences, and all other subjects specifically named, when and only when, the consumer shall pay, or offer to pay, the price affixed to each item, and that the company is not bound to supply water for any residence, or other subject so specifically mentioned, on charges to be paid as per meter measurement at twenty-five cents per thousand gallons; while the plaintiff asserts the right to an option of taking water at the fixed rate named in the

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schedule or by placing a meter at his own expense, to have water supplied at the price of twenty-five cents per one thousand gallons, actual measurement.

In our opinion the plaintiff's position is the correct one. The manifest intention of the ordinance, it seems to us, was to fix the maximum charge for water at twenty-five cents per thousand gallons. If the consumer thinks proper he may decline to go to the expense of a meter, and accept the water to be furnished at the "*approximated*" or estimated schedule price. If, however, the water company's patron deems it best, or to his interest, he is left the choice of placing a meter at his own expense, and then the charge against him is no longer a mere guess or estimate, but he will pay for the water actually used—no more, no less.

The relator Lanyon saw proper to adopt the latter course, and to have the water consumed on his premises measured. He consulted with the officers of the defendant company as to the best character of meter, and placed it properly to receive the water that might be used. He was then, on payment or tender of the necessary charges, clearly entitled as a citizen of Joplin to have the water turned into his residence.

We hold too—against the contention of defendant—*mandamus* to be the proper remedy in a case like this. The water company in the enjoyment of its franchise to lay pipes in the streets of Joplin has a monopoly to supply water for the inhabitants. It is there, to a certain extent, exercising the right of eminent domain. Its duties are of a public nature. It is bound by the terms of its grant to supply water from its mains to all citizens who may put themselves in a condition to demand and receive it. Should it fail or refuse to do so without just cause, then *mandamus* will lie to compel performance of this duty. 2 Beach on Private Corporations, secs. 834–6; 2 Morawetz on Private

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Corporations, sec. 1132; *C. & N. W. Ry. Co. v. Hempstead*, 56 Ill. 365; *Webster Telephone Case*, 17 Neb. 126–136–7. We have here the *presence* of a specific legal right and the *absence* of an effectual legal remedy, which clearly warrants a resort to *mandamus*.

We observe the point made by defendant's counsel that the peremptory writ does not follow and conform to the alternative writ of *mandamus*. The learned counsel contends for the correct doctrine in the abstract, as announced in this state (*State ex rel. Millett v. Field*, 37 Mo. App. 83–100); and that is, that the peremptory writ can go no further nor vary in any substantial particular from the commands of the alternative writ. But we fail to discover here any material departure. The relator had become entitled, by reason of his providing a meter and the prepayment or tender of the necessary charges, to have the water turned into his premises. The alternative and peremptory writ substantially commanded this and nothing more.

The judgment is for the right party, and will be affirmed. All concur.

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WASHINGTON CLOUD, Respondent, v. THE KANSAS LOAN & TRUST COMPANY AND H. C. FLOWER, Appellants.

Kansas City Court of Appeals, January 2, 1893.

Trusts and Trustees: ATTORNEY AND CLIENT. A deed of trust in the event of the trustees therein named refusing to act authorized any attorney of record residing in the state of Missouri whom the beneficiary might appoint in writing to act. *Held*, the attorney of the beneficiary was competent to act. (*In re Mayfield*, 17 Mo. App. 684, *distinguished*.)

Appeal from the Jasper Circuit Court.—Hon. M. G. McGregor, Judge.

Reversed and remanded *(with directions)*.

Henry C. Flower, for appellants.

(1) The holder of the note, under the terms of the contract, alone had the right to appoint a successor to the original trustee, and plaintiff by signing said contract estopped himself from denying that right. *Ellis v. Railroad*, 107 Mass. 12; *Trust Co. v. Fisher*, 106 Ill. 189; *Loan & Trust Co. v. Hughes*, 11 Hun (N. Y.); 1 Devlin on Deeds, sec. 387; Lewin on Trusts [5 Ed.] 459. (2) To be sure, he had been employed by them as attorney in cases which they had, but the mere fact that he had before been employed by them did not of itself disqualify him from acting as trustee, and did not raise a presumption that he would not execute the trust with fairness both to the plaintiff Cloud, and the beneficiary, E. M. Sheldon. *Ornsorg v. Turner*, 13 Mo. App. 533–549; *Sternberg v. Valentine*, 6 Mo. App. 176; Devlin on Deeds, sec. 387, p. 376.

John T. Sturgis, for H. C. Flower, appellant.

(1) The beneficiary clearly had the right to appoint the trustee under the clause in the trust deed conferring that power. *Klein v. Glass*, 53 Tex. 37; *Jacobs v. McClintock*, 53 Tex. 72; 2 Jones on Mortgages [3 Ed.] sec. 1774. (2) As to the suitableness of the defendant to act as trustee on account of his relation to the beneficiary, the evidence does not sustain the finding of the court on this point. The only charge against Flower is, that he was an attorney and had acted as trustee for the corporation in other cases. *Sternberg*

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v. *Valentine*, 6 Mo. App. 176; *Ornsorg v. Turner*, 13 Mo. App. 533; 2 Jones on Mortgages [3 Ed.] sec. 1771. And plaintiff must make out a stronger case to sustain an injunction to restrain a sale than to redeem after sale. 2 Jones on Mortgages [3 Ed.] secs. 1801, 1802, and cases cited. And, in equity cases, courts will review the evidence. *Cornet v. Bertelsmann*, 61 Mo. 118; *Morey v. Staley*, 54 Mo. 419. Even the beneficiary himself may be the trustee, and still have the power to sell, in which case he acts as a mortgagee. *Cassady v. Wallace*, 102 Mo. 580.

W. Cloud and *O. L. Cravens*, for respondent.

(1) That respondent is entitled to injunctive relief under the allegations in the petition and evidence, there can be no serious question. *Bank v. Davidson*, 40 Mo. App. 421; *Church v. Hintze*, 72 Mo. 363; *Harrington v. Utterback*, 57 Mo. 519; *Gardner v. Terry*, 99 Mo. 523; *State to use v. Tiedeman*, 69 Mo. 308. (2) The real question in this case is narrowed down to the correctness of the holding of the lower court that Flower was not a competent person to act as trustee on account of the confidential relations existing between himself and the holder of the note. In the foreclosure, with which Flower was proceeding as trustee, he was the paid and hired servant and counsel and attorney for the holder of the note, and, being employed to guard the interests of one of the parties, he cannot act impartially as to the other. His relations to Sheldon were such that no court of equity, in view of Flower's actions in this case, can hold he is within the purview of the acknowledged duty of the trustee to be impartial and disinterested. Hence, the holding of the lower court was undoubtedly correct. *In re Mayfield*, 17 Mo. App. 684; *Long v. Long*, 79 Mo.

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644, 656; Jones on Mortgages [4 Ed.] secs. 1770–1, The law would watch with more jealous scrutiny the transactions of Flower on account of his occupying intimate and confidential relations with Sheldon, the beneficiary. *Leavitt v. La Force*, 71 Mo. 353.

Gill, J.—This is an injunction suit brought by plaintiff Cloud, whereby it is sought to enjoin the defendants, particularly defendant Flower, from selling certain real estate covered by a deed of trust executed by Cloud May 1, 1886. From the record before us it appears that Cloud borrowed of the defendant trust company the sum of $700, giving his note due in five years with interest coupons attached. To secure the loan, Cloud executed his deed of trust in the ordinary form, and provided therein that if default was made on any interest obligation then the entire debt should become due at the option of the beneficiary. Sweet was named as trustee with a provision that if he failed or refused then one Noble was authorized to act.

Following this the deed of trust further declared: "And in case of the death, absence, inability or refusal to act of the said party of the second part or any of his successors in trust, then any attorney of record, residing in the state of Missouri, whom the said party of the third part or the legal holders of said note may in writing appoint, shall be and he is hereby made successor in trust to the trustee hereinbefore named with like powers and authority."

The plaintiff Cloud failed to pay the interest as he had agreed for the years 1889 and 1890; and, thereupon, in April, 1891, Sweet and Noble, the trustees named in the deed of trust, declining to act, defendant Flower, an attorney of Missouri, was in writing appointed by the legal holder of the note to act as trustee. Flower proceeded at once to perform the trust

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and advertised the property for sale. Plaintiff thereupon began this suit to enjoin the sale. The cause was heard in the court below, where plaintiff succeeded, and defendants have appealed.

There is no rule of law or equity upon which this judgment can be sustained. The court below seems to have rested its decision on the mere fact that the trustee and defendant Flower had at times, antecedent and contemporaneous with his attempt to foreclose this deed of trust, acted as an attorney for the beneficiary in the trust deed, and that he, therefore, was not, as declared by the court, "a suitable person to act as trustee in the deed of trust." This is not a proceeding under sections 8683 and 8684 of the Revised Statutes for the appointment of a trustee on a failure of those designated by the deed, as was the case in *In re Mayfield*, 17 Mo. App. 684, but this trustee Flower was in terms practically named by the parties themselves. The holders of the debt secured have done that, and nothing more than they were authorized to do under the terms of the deed of trust executed by plaintiff Cloud. They were empowered by the plaintiff (in case of the failure of Sweet and Noble to act as trustees) to appoint some attorney of the state of Missouri to act instead of such trustees. And as such beneficiaries saw proper to select one who had been, or was at the time, their attorney, we discover no reason why they should not be allowed to do so. It would not have been improper even to have designated one of the mortgagees or beneficiaries to act as trustee in such an emergency. Such a party would then be a mortgagee with power of sale. *Cassady v. Wallace*, 102 Mo. 575, 580.

The judgment here was clearly for the wrong party. It will, therefore, be reversed and the cause remanded with directions to assess damages and enter a judgment for defendants. All concur.

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SALLIE C. KEYES *et Vir*, Respondents, v. THE BANK OF HARDIN, Appellant.

Kansas City Court of Appeals, January 2, 1893.

1. **Instructions:** VERDICT: APPELLATE PRACTICE. Instructions set out in the opinion are approved; there was evidence to support the verdict and the appellate court will abide the finding.

2. ———: ASSUMING FACT. An instruction need not submit a fact to the jury when it is practically admitted.

3. **Banks and Banking:** COLLECTION: CONSIDERATION: CONVERSION. When a bank received a note for collection and wrongfully gave it over to another, whereby it was lost, the fact that plaintiff in an action for its conversion fails to allege and prove that it undertook the collection for a consideration, will not defeat a recovery.

4. ———: POWER TO COLLECT. While corporations have only such powers as are expressly or impliedly given by their charters, yet the power to receive commercial paper for collection is necessarily implied from the character of the banking business.

Appeal from the Ray Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

THIS is an action commenced in the circuit court of Ray county, Missouri, on the fourth day of December, 1890, by Sallie C. Keyes and Thomas H. Keyes, her husband, against the Bank of Hardin, a corporation, to recover damages caused by the carelessness and negligence of defendant in delivering a certain promissory note to one James King, which plaintiffs had left with the bank, as plaintiffs allege, for collection; but, as defendant contends, in the nature of a special deposit, by reason of which the plaintiffs lost the amount due to them on the note. It grows out of the following facts: Sallie C. Keyes, one of the plaintiffs,

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owned a tract of land in Kansas. Some time in March, 1890, at Kansas City, Kansas, she sold or traded the land to one James King for three notes, and the one over which this controversy arises was one of them. This note was for $400, dated August 1, 1889, given by L. E. and E. L. Dorsey of Ray county, Missouri, and payable one day after date, to the order of James King. It was credited December 23, 1889, by $20. Under the terms of the contract between plaintiff, Sallie C. Keyes, and said King, the plaintiff was to have $350 of this note, and King was to have the balance. King did not have the note with him at the time the agreement was made, but subsequently, on the tenth day of March, 1890, he met Thomas H. Keyes at Morton, Ray county, Missouri, and there delivered the note to him as the agent of Sallie C. Keyes. Thomas H. Keyes went to Ray county for that purpose—was sent there by his wife to get the note, and was fully authorized by her to do whatever was necessary in the matter to obtain the note and arrange for its collection. After the note was delivered to Thomas H. Keyes, as agent for his wife, it was offered to George Keyes, the brother of Thomas Keyes, for collection, but he declined to take it, and told the parties to leave it with the Bank of Hardin for collection, as that was a part of the bank's business. On the next day King and Thomas H. Keyes went to the defendant bank at Har lin, and according to Keyes' testimony *he* gave the note to William Hughes, president of the bank. He further testifies that it was given *for collection*, and told him to figure it up, and it amounted to $398.96. Keyes also told Hughes he wanted him to send $350 of it to Sallie C. Keyes at Kansas City, Kansas, and the balance was to be paid to King. King said that was all right. The whole agreement between King and Mrs. Keyes was fully

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explained to the bank officials at the time, and the cashier made a calculation as to the division of the amount due on the note according to the agreement between King and Keyes. The bank officials, at the time, made a written memorandum of the amount due on the note, showing that there was then due thereon the total of $398.96, and that of this they should pay over (when collected) $350 to Mrs. Keyes, and the remainder, $48.96, to King. Keyes' testimony is that this statement of the calculation was given by Mr. Hughes to King to show Dorsey in order that Dorsey might see the amount that was coming to King, but no receipt was given to King in the presence of Keyes, nor with his knowledge. The bank officials testified, however, that they gave a receipt to King because the note was payable to King. They also testified that King refused to indorse the note, and they refused to take it for collection unless it was indorsed, and that King refused to deliver the note until his part was paid—it had already been delivered by King to Keyes the day before. Keyes also denied that the bank refused to take the note for collection unless it was indorsed. Some days after the note was left there, King went to the bank and asked for the note and it was delivered to him by the bank, without any authority from plaintiffs and without their knowledge. King collected the full amount of the note from the makers and pocketed the proceeds. King is insolvent.

T. N. Lavelock, for appellant.

(1) The petition does not state facts sufficient to constitute a cause of action against the Bank of Hardin. Revised Statutes, 1889, secs. 2508, 2745; Bliss on Code Pleading [2 Ed.] secs. 268-9; Bishop on Contracts [Enlarged Ed.] sec. 40; *Dairy Co. v. Mooney*, 41 Mo.

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App. 665; *Jemison v. Bank*, 19 Am. St. Rep. 483; *Hart v. Ins. Co.*, 21 Mo. 91. (2) An agreement not supported by a consideration is invalid. 2 Blackstone's Commentaries, 442; Bishop on Contracts [Enlarged Ed.] sec. 40; 5 Lawson on Rights & Remedies, sec. 2244. (3) In a suit to recover damages for the breach of a contract, which does not import a consideration, it is necessary to allege and prove the consideration. Bliss on Pleading [2 Ed.] sec. 268; 1 McQuillin's Practice, sec. 302; 1 Parsons on Contract [6 Ed.] side p. 449, note *z*; Bishop on Contracts [Enlarged Ed.] secs. 24, 40; Bishop on Contracts [Enlarged Ed.] secs. 77, 78; *Montgomery Co. v. Auchley*, 92 Mo. 129; *Wulze v. Schaefer*, 37 Mo. App. 553. (4) A banking corporation possesses only such powers as are expressly conferred or necessarily implied, and the enumeration of these powers excludes all others. Revised Statutes, 1889, secs. 2508, 2745; Lawson on Rights & Remedies, secs. 352, 373; Beach on Private Corporations, sec. 387; Morse on Banks & Banking, secs. 6, 56; Field on Corporations, sec. 54; *Weekler v. Bank*, 20 Am. Rep. 95; *Lyon v. Railroad*, 10 Am. St. Rep. 521; *Davis v. Railroad*, 41 Am. Rep. 221; *Railroad v. Seely*, 45 Mo. 212; *Dairy Co. v. Mooney*, 41 Mo. App. 671. (5) A corporation cannot be made to respond in damages for the breach of an executory contract made by its officers without authority of law. 2 Morse on Banks & Banking [3 Ed.] sec. 730; Beach on Private Corporations, sec. 426; *Dairy Co. v. Mooney, supra; Day v. Buggy Co.*, 21 Cent. L. J. 210; *Elevator Co. v. Railroad*, 4 Am. St. Rep. 798; *Jemison v. Bank*, 19 Am. St. Rep. 482; *Long v. Railroad*, 24 Am. St. Rep. 93. (6) Persons dealing with a corporation through its agents must take notice, *first*, of the extent of its corporate powers, and, *second*, of the scope of the agent's authority. 1 Beach on Private Corporations, secs. 383–4; *Davis v.*

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Railroad, 41 Am. Rep. 223; *Elevator Co. v. Railroad*, 4 Am. St. Rep. 798; *Jemison v. Bank*, 19 Am. St. Rep. 484.

Ball & Hamilton, *B. F. Deatherage* and *O. G. Young*, for respondent.

(1) The petition states sufficient facts to constitute a cause of action. It was unnecessary for it to state the bank undertook to collect the note for a consideration. Morse on Banks & Banking [2 Ed.] p.385; *Ivory v. Bank*, 36 Mo. 475; *Gearhardt v. Savings Inst.*, 38 Mo. 60; *Smedes v. Bank*, 20 Johns. 372; *Bank v. McKinster*, 11 Wend. 475; *Bank v. Bank*, 6 Metc. 13; *Hall v. Bank*, 3 Rich. (S. C.) 366; *Titus v. Bank*, 6 Vroom (N. J.) 588; 2 American & English Encyclopedia of Law, p. 111, foot note 1. (2) Power to make collections upon business paper is incidental to the banking business, and need not be expressly conferred. 2 American & English Encyclopedia of Law, title, banks and banking, sub-head, collections, p. 111; *Tyson v. Bank*, 6. Blackf. (Ind.) 225; *Smedes v. Bank*, 20 Johns. (N. Y.) 372; *Jockusch v. Towsey*, 51 Tex. 129; *Fabens v. Bank*, 23 Pick. (Mass.) 330; Morse on Banks & Banking [2 Ed.] p. 384; *Ivory v. Bank*, 36 Mo. 475; *Gearhardt v. Savings Inst.*, 38 Mo. 60. (3) The bank, upon accepting the agency, is bound to exercise reasonable care and diligence in the discharge of its assumed duties. 2 American & English Encyclopedia of Law, note 2, p. 111; *Bank v. Bank*, 91 U. S. 92–104; *Fabens v. Bank*, *supra; Bank v. Bank*, 10 Cush. (Mass.) 582; *Bank v. Bank*, 36 Conn. 325: *Ivory v. Bank*, *supra; Gearhardt v. Savings Inst.*, *supra; Bank v. Bank*, 44 Conn. 567; *Bank v. Bank*, 77 N. Y. 320; *Blanc v. Bank*, 28 La. Ann. 921; *Kincheloe v. Priest*, 89 Mo. 240. (4) There being evidence

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to support the allegations of the petition and the verdict of the jury, this court will not interfere with the verdict of the jury, and will not pass upon the weight of the testimony. *Shockley v. Fisher*, 21 Mo. App. 551; *Schluter v. Weidenbroker*, 23 Mo. App. 440; *Swayze v. Bride*, 34 Mo. App. 414; *Ewing v. Phillips*, 35 Mo. App. 144; *Hamilton v. Boggess*, 63 Mo. 223; *Gaines v. Fender*, 82 Mo. 509; *Caruth v. Richeson*, 96 Mo. 186.

Gill, J.—From the foregoing statement it will be noticed that the controversy on the *facts* is about this: Plaintiff claims that her husband, acting for her, left the Dorsey note with the bank for collection, and with the understanding that when collected the $350 should be paid over to her, and the $48 to be paid to King. While defendant contends, that the note was received (as a kind of special deposit) from *King*, and not from the plaintiff, and that King all the time controlled the paper, and, hence, a surrender thereof to him was entirely proper.

On these two theories of fact the trial court, of its own motion, instructed the jury as follows: "1. If the jury believe from the evidence that Sallie C. Keyes, by Thomas H. Keyes, her husband, deposited in the Bank of Hardin the note for $400 read in evidence, executed by L. E. Dorsey and Ed. Dorsey, and payable to the order of James King, and that said bank agreed with said Thomas H. Keyes, as agent for said Sallie C. Keyes, to collect said note and pay plaintiff the sum of $350 and the remainder to James King, and believe that said bank afterwards turned over said note, without authority from plaintiff, to said James King, who collected the same, and that the sum of $350 was thereby lost to plaintiff, then the jury will find for the plaintiff in the sum of $350.

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"2. But if the jury find from the evidence that James King had an interest in said note, and that he refused to indorse said note to plaintiff and to relinquish his control of the note until the amount coming to him out of said note was paid, and that James King turned said note over to said Bank of Hardin, and took a receipt therefor in his own name under an arrangement by which, if the money due on the note was paid into the bank, the sum of $350 was to be held by the bank for plaintiff, then the said King had a right to withdraw said note from the bank, and, if he did so before it was paid, the jury will find for the defendant."

The jury under these instructions rendered a verdict for the plaintiffs.

Unless, now, it shall otherwise appear from some technical objections urged by defendant's counsel (and which we shall hereafter notice), it becomes our plain duty to affirm this judgment. The foregoing instructions presented to the jury in a clear and concise manner the two sides of the case on its merits. There was substantial evidence to support the respective claims of both plaintiff and defendant; and, hence, we must abide the finding of the jury, and declare with the verdict the case to be that as detailed in plaintiffs' evidence, to-wit: That plaintiffs, holding the note in question, placed the same with defendant for collection, and that defendant without authority of the plaintiffs gave the note over to King, and that thereby the interest of the plaintiffs therein (to-wit, $350) was lost to them.

Defendant's counsel suggests that the court's first instruction was erroneous, in that it did not submit to the jury whether or not Mrs. Keyes, the plaintiff, was the owner of the note she deposited with defendant for collection. That was unnecessary since plaintiffs'

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interest was practically admitted. That Mrs. Keyes had an interest to the extent of $350 in the proceeds of the Dorsey note, was undisputed and undoubted under the evidence, and the court, therefore, was fully justified in assuming that fact.

It is further contended with some show of sincerity that before plaintiffs could recover they should have alleged and shown that defendant undertook the custody and collection of the note for a *consideration.* In answer to this position, it is only necessary to say, that, in so far as concerns this particular controversy, it is wholly immaterial whether defendant was to hold the note and make the collection with or without compensation. This is not a suit for a failure to collect as agreed, but is an action for conversion. The defendant had the custody of a valuable security belonging to the plaintiff, and it was wrongfully given over to another by reason whereof the plaintiff lost her interest therein. Whether defendant was holding the same as a bailee for reward or as a gratuity, its liability for plaintiffs' loss was the same under the facts and circumstances as found by the jury. A gratuitous bailee is liable for such a degree of negligence as was this; and this too whether it was a general or special deposit. 1 Morse on Banking [3 Ed.] secs. 194–196.

Further objection is made that the defendant banking corporation had no power or authority to receive the note for collection, and, hence, is not bound in this action. This contention, too, is without merit. Admitting the rule to be as claimed by counsel, that corporations have only such powers as are expressly or impliedly given by their charters or acts of incorporation, and yet there can be no doubt as to the necessary authority in this bank to receive and collect commercial paper for its patrons. It is not so named nor denied in its charter, but is necessarily

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implied from the character of its business. The defendant was organized to, and was in the conduct of, a general banking business; and within the limits of that business the receiving on deposit and for collecting commercial paper is by the common understanding part and parcel of such business. "In addition to the powers given in the charter, all powers necessary for the carrying out of those express powers are impliedly given, and the courts are liberal in construing charters so as to include them." Lawson on Rights & Remedies, sec. 374; 2 Beach on Private Corporations, sec. 385. "Power to make collections upon business paper is incidental to the banking business, and need not be expressly conferred." 2 American & English Encyclopedia of Law, p. 111, and cases cited.

Upon a thorough review of every point made, we discover no reason for disturbing this judgment, and it is, therefore, affirmed. All concur.

GAGE BROS., Appellants, v. ROGERS SISTERS, Respondents.

Kansas City Court of Appeals, January 16, 1893.

Practice, Appellate: COSTS FOR PRINTING ABSTRACTS. Appellant filed in the appellate court a complete transcript of the record and also filed an abstract of such record. His appeal being sustained he filed a motion to tax costs of printing his abstract against the respondent. *Held*, respondent is not liable for such costs as he is taxable with the costs of the transcript.

On Motion to Tax Costs.

MOTION OVERRULED.

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Parkinson & Graves, for appellants.

Francisco Bros. & Rose, for respondents.

ELLISON, J.—There was filed in this court, in this cause, by appellants, a perfect transcript of the record and proceedings in the trial court under section 2253, Revised Statutes, 1889. Appellants also filed an abstract of such record. Since we have sustained appellants' appeal and reversed and remanded the cause, they come by this motion seeking to have us tax in their favor against respondent $118, as the cost of printing such abstract. We have concluded that the section of the statute referred to does not justify their motion. Our construction of the statute being that the cost of printing abstracts is only to be allowed in cases where, in lieu of a perfect transcript, a certified copy of the record entry of the judgment, order or decree appealed from is substituted. Section 2253 does not provide for printing an abstract where a full transcript is filed by the appellant. The respondent, if he loses in the appellate court, is compelled to pay for the full transcript and he ought not also to be compelled to pay for an abstract unless such be the plain statute. This section in authorizing an abstract has in view the skeleton transcript, for it provides that if "the opposite party shall not concur in such abstract of the record, he shall specify his objections thereto in writing, and file the same with the clerk and serve the adverse party with a copy thereof, and, thereupon, the clerk of the appellate court shall forthwith issue and send an official order commanding the clerk of the trial court to send such appellate court a certified transcript of that part of the record so in dispute," so that the court may determine between them. It is thus apparent that the abstract of the record provided for in this section is based upon

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the idea that there is only a skeleton transcript in the appellate court, and does not contemplate an abstract when there is a full and complete transcript on file.

It does not follow from this that an abstract of the record must not be printed in cases where the appellant files a full and complete transcript. He must still print an abstract, but he can have no costs allowed therefor, since the statute, properly construed, does not provide for it, and by filing the full transcript (if successful) he gets costs for that. Such abstract is required now, as it was before the enactment of section 2253, under rule 15 of this court, which rule is authorized by section 2312, Revised Statutes, 1889. The motion for costs of printing will, therefore, be overruled. All concur.

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THE CLYDESDALE HORSE COMPANY, Respondent, v. E. BENNETT & SON, Appellants.

Kansas City Court of Appeals, January 16, 1893.

1. **Principal and Agent:** HOLDING OUT: RATIFICATION: VARIANCE. Plaintiff bought of defendant's agent a horse on condition, that, if he did not prove as warranted, he should be returned to defendants, who agreed to replace him with another of the same breed and price. Plaintiff returned the horse to the same agent at the defendants' stable, who received him, showed plaintiff other horses but offered none of the same breed and price as it demanded. Plaintiff tried to see defendants but was unable to do so. There was in evidence an admission of one of the defendants that the agent had full charge of defendants' horse business. Defendants afterward disposed of the returned horse. *Held:—*
   (1) The agent had power to bind the defendants by receiving the horse, and it was sufficient to make demand of him to replace him.

   (2) That defendants ratified the act of the agent by disposing of the horse.

   (3) That there was no variance between the evidence and the allegation that the plaintiff had returned the horse to defendants, and made demand on them.

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2. Practice, Trial: VARIANCE: AFFIDAVITS. No variance between the allegation and the proof shall be deemed fatal unless it has actually misled the party to his prejudice on the merits, which must be made to appear by affidavit.

Appeal from the Jasper Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED.

Quinton & Quinton and *Hackney & Thomas*, for appellants.

The petition alleges a delivery of the horse to E. Bennett & Son, and alleges a refusal by E. Bennett & Son to exchange for another horse of the same price and breed, pursuant to the contract. This was the issue joined. The object of the declaration "is to apprise the defendant of what he is called upon to answer, that he may prepare his pleadings and evidence, necessary for his defense." Under the allegations of the declaration, we insist it would be a failure of proof to show a delivery to one McLaughlin, and a refusal by one McLaughlin, attempting to show an agency in McLaughlin with the authority to bind the defendants under the contract, where the basis of the action is delivery to E. Bennett & Son, and a refusal by them. *Merl & Co. v. Haskell*, 10 Mo. 409; 1 Chitty on Pleadings, 285, 286; *Peck v. Ferrara*, 19 Mo. 30; *Harper v. Railroad*, 44 Mo. 488; *Waldhier v. Railroad*, 71 Mo. 514–517; *Price v. Railroad*, 72 Mo. 416; *Bruce v. Sims*, 34 Mo. 246.

McReynolds & Halliburton, for respondents.

The tender and delivery of the horse to the agent of Bennett & Son was a tender and delivery to Bennett & Son. *Belt v. Ins. Co.*, 12 Mo. App. 100;

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Haywood v. Ins. Co., 52 Mo. 181; *Duncan v. Able*, 99 Mo. 188. (2) Bennett & Son ratified the agency of McLaughlin after the delivery of the horse to him by taking and disposing of the horse, said act being a waiver of any formal tender to them individually, if any was ever necessary. *Kamper v. McManus*, 26 Mo. App. 51; *Ferris v. Theno*, 72 Mo. 446. (3) There was no variance between the pleadings and proof in this case. And, if there had been any variance, appellants cannot have any benefit of it here, not having alleged or shown that they were misled thereby. Revised Statutes, 1889, secs. 2096, 2097; *Olmstead v. Smith*, 87 Mo. 602; *Shelton v. Putnam*, 76 Mo. 434; *Brown v. Railroad*, 31 Mo. App. 661.

Smith, P. J.—This is a suit for damages for breach of contract on the warranty of a stallion. The facts in the case as shown by the uncontradicted evidence are that plaintiffs bought of defendants a stallion named "Merry Boy" under a written guarantee to the effect that with proper care and attention he would be a reasonably sure foal getter; that in case he proved barren they agreed to replace him with another horse of same breed and price upon delivery to defendants of "Merry Boy" as sound and in as good condition as when purchased. Plaintiffs were to pay $1,600 for the horse, which was done by giving three notes, two of which they paid before they commenced suit, and the third was in the hands of an innocent purchaser. It was agreed on the trial defendants had sold all the notes before maturity.

The horse after a thorough trial and receiving proper care and handling proved not to be a reasonably sure foal getter. Plaintiffs on August 13, 1889, took said horse to Topeka, Kansas, and delivered him at the stable of defendants to the party in charge, one

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McLaughlin, and demanded another horse of the same breed and price which was refused by him, though he showed plaintiffs a large number of horses. Plaintiffs never at any time saw either of the defendants. They bought the horse of McLaughlin as an agent, and delivered him back to the same person as agent in charge of defendants' stables in Topeka, Kansas. At the time the horse was taken to Topeka, E. R. Bennett was in Scotland and E. Bennett was away from home, his whereabouts not being shown. Not only this, but the witness Reynolds testified that one of the defendants in the summer of 1889 stated in his presence and hearing that McLaughlin had full charge and control of defendants' business in Topeka, Kansas.

Plaintiffs getting no horse in exchange for "Merry Boy" left him at the stable of defendants in Topeka, Kansas, with their agent McLaughlin, and defendants afterwards disposed of him. And, failing to give or offer plaintiffs a horse of the same breed and price, plaintiffs brought suit for damages and recovered judgment for the purchase price and six per cent. interest from date of return of horse, from which defendants have appealed.

The appealing defendants complain of the action of the trial court in overruling their demurrer to the plaintiffs' evidence. The grounds of the demurrer to the plaintiffs' petition alleged that the horse was delivered to defendants who refused to give plaintiffs another horse of the same price and breed in his stead, while the plaintiffs' proof shows a delivery to one McLaughlin and a refusal by him to give plaintiffs another horse of like price and breed in his place. It is contended by defendants that this constituted a fatal variance between the *allegata* and *probata*. This contention we cannot sustain. The evidence tended quite conclusively to show that McLaughlin was the general agent

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of the defendants for the transaction of their horse business. They were non-residents of the state of Kansas, or if not they were usually absent in Scotland or elsewhere. The plaintiffs never saw them though they endeavored to do so. It was McLaughlin who sold them as agent for defendants the horse, and took their notes payable to the defendants for the purchase money. It was he who received the horse back from the plaintiffs. It was he who offered plaintiff other horses of different values from that of "Merry Boy" in place of him. It was he who spoke and acted for defendants in the whole transaction from beginning to the end. These facts, coupled with the admission of one of the defendants to the effect that McLaughlin was defendants' agent at Topeka for the management of their horse business there, leave no reasonable doubt in our mind that the latter was such agent.

The subsequent disapproval of the horse by defendants was a ratification of the whole transaction of McLaughlin with plaintiffs, if the latter was not in the first instance invested with authority as the agent of defendants to make the transaction. The rule is fundamental that if the principal elects to ratify any part of the unauthorized act he must ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him and repudiate its obligations. Mechem on Agency, sec. 130.

In any view of the case that may be taken McLaughlin must be regarded as the agent of defendants in the matter out of which this controversy arose. Therefore, the tender of the horse by plaintiff to and receipt of him by McLaughlin was a tender and delivery to defendants, and proof of this fact was all that was required to support the allegation of the petition as to the tender of the horse to defendants. There was no

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such fatal lack of correspondence between the allegation and proof as the defendants seems to suppose. None of the authorities cited by defendants lend support to their contention.

It is not contended there was an entire failure of proof, but that there was a variance between the allegation in the petition and the proof. The statute is that no variance of this kind shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits; when it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court by affidavit showing in what respect he has been misled. Revised Statutes, sec. 2096; *Brown v. Railroad*, 31 Mo. App. 661; *Turner v. Railroad*, 51 Mo. 509; *Meyers v. Sharp*, 57 Mo. 56. Nothing of the kind was done by defendants, so that they are in no situation to make the complaint they do.

The appeal seems to us without merit, and for that reason the judgment will be affirmed. All concur.

GEORGE WEBSTER, Respondent, v. WM. B. MYERS, Appellant.

Kansas City Court of Appeals, January 16, 1893.

Contract: ALTERING TERMS. A agreed to pay B a certain amount on a certain day when certain money was to be paid B by C. B subsequently extended C's time of payment and failed to make efforts to collect of C. *Held*, B could not thus prejudice A's rights, and, on such conduct of B, A's demand became due and would sustain an action.

Appeal from the Jasper Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED.

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McReynolds & Halliburton, for appellant.

In *Allen v. Davis*, 11 Mo. 479, it is held that, where a note is made payable so soon as the amount can be made on a suit in which B is plaintiff, and the heirs and legal representatives of C are defendants, the note will not be held due until the money is made. In *Chandler v. Carey*, 8 Am. St. Rep. 814, 64 Mich. 237, it is held that an agreement to pay A or bearer $100 on or before the first day of next October, upon the completion of work to be done by said A upon a dwelling-house to be built by him is not a promissory note, but a simple contract to pay upon condition, and required proof of performance before recovery. The instrument sued on in this case is not a promissory note, but is a conditional contract, and is not payable until the balance of the purchase price of the mining interest, $5,000, is paid. *Allen v. Davis*, 11 Mo. 479; *Chandler v. Carey*, 8 Am. St. Rep. 814; 1 Randolph on Commercial Paper, secs. 95, 111, 112, 115, note 9, p. 151; 3 Randolph on Commercial Paper [Ed. 1888] secs. 1588, 1871; *Blake v. Coleman*, 22 Wis. 396; *Wakeman v. Sherman*, 9 N. Y. 85; *Kelley v. Chamberlain*, 47 Mich. 241; *Lamb v. Story*, 45 Mich. 488; *Smith v. Van Blascum*, 45 Mich. 371; *Mfg. Co. v. Parr*, 30 Am. Rep. 830; *Miller v. Poage*, 56 Iowa, 96; *Smith v. Morland*, 59 Iowa, 645; *Baird v. Underwood*, 74 Ill. 176; *Hacker v. Brown*, 81 Mo. 68.

J. D. Perkins, for respondent.

(1) The instrument sued on in this case is a non-negotiable promissory note, and became due and payable on September 21, 1890, and the first count of plaintiff's petition declares on it as a note. *Brady v. Chandler*, 31 Mo. 28; *Spears v. Bond*, 79 Mo. 468; *Lindell v.*

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Rokes, 60 Mo. 249; 1 Daniel on Negotiable Instruments, sec. 3, pp. 36, 37; *Stillwell v. Craig*, 58 Mo. 24; *Palmer v. Hummer*, 10 Kan. 464; *Ubsdell v. Cunningham*, 22 Mo. 124. The instrument itself imported a consideration. Revised Statutes, 1889, sec. 2389; *Montgomery Co. v. Auchley*, 92 Mo. 129; *Wulze v. Schaefer*, 37 Mo. App. 551; *Woodson, Ex'r, v. Ritchie*, 36 Mo. App. 506. (2) The second count of the petition declares on the instrument sued on as a written obligation to pay the amount therein stated, and sets up the consideration and circumstances under which it was executed and alleges the solvency of the purchasers of the mining property therein mentioned, and a failure and refusal of defendant to collect the balance of the purchase price thereof, and that a reasonable and sufficient time had elapsed in which he could have collected it. This count of the petition states a good cause of action, and the objection to the introduction of any evidence on the ground, that there was a failure of consideration was properly overruled. *Clark v. Condit*, 11 Mo. 79; *Tureman v. Stephens*, 83 Mo. 218; *Marble Co. v. Mann*, 36 Vt. 697.

Ellison, J.—This is an action based on the following instrument of writing executed by defendant to plaintiff, viz.:

"Carthage, Mo., July 21, 1890.

"There is due Geo. Webster as commissions on the sale of my interest in the Herin & Myers mine thirteen hundred dollars ($1,300), said amount to be paid on September 21, 1890, when the balance of the purchase money is paid. Amount due $5,000."

Plaintiff had judgment below and defendant brings the case here. The trial was without a jury, the court, of its own motion, giving the following declaration of law: "The court declares the law to be that if

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defendant agreed to pay plaintiff $1,300 on the twenty-first day of September, 1890, when $5,000 was collected from Otis & Pierce, balance of purchase price of the one-half interest in the mining lots sold them, then said amount became due and owing to plaintiff by defendant so soon after the twenty-first day of September, 1890, as defendant could collect such balance by the use of reasonable diligence, and, if, thereafter, defendant voluntarily extended the time for the payment of such balance still owing, or any part thereof, by taking notes from Otis & Pierce for $2,500 not to become due until July, 1891, without the consent of plaintiff, and failed and refused to make any effort to collect any balance of said $5,000, then the sum of $1,300, thereupon, became due plaintiff, and plaintiff ought to recover."

This declaration is a proper statement of the law on the hypothesis as to the facts. It is supported by the case of *Tureman v. Stephens*, 83 Mo. 218, and cases therein cited. If the matters hypothetically put in the instruction are true, then the *Tureman case* is authority, by close analogy, for the instruction. It certainly ought not to be allowed defendant to alter his arrangement with the purchasers of the property in regard to the payment of the $5,000, to the prejudice of plaintiff without his consent, coupled as it is with defendant's failure to make any effort to collect the balance. No voluntary act of defendant, whether by omission or commission, which, without plaintiff's consent, would work to his prejudice, as contemplated by the contract, ought to be allowed as a shield to defendant.

This only leaves the further question whether there was evidence upon which to base the declaration of law. A perusal of the record satisfies us that there was. That evidence being before the trial court, the conclusion to be drawn therefrom belonged to that

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court and not to us. There was no error in overruling the motion to continue, or in refusing defendant's instructions.

We feel bound to affirm the judgment. All concur.

F. E. Lovell, Appellant, v. L. M. Davis *et al.*, Respondents.

Kansas City Court of Appeals, January 16, 1893.

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58	253
58	581
59	340
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62	72
52	342
63	277

1. **Constitutional Law:** NEW TRIALS: ACT OF 1891. The act of 1891 (Session Acts, p. 70), allowing an appeal from the action of the trial court in granting a new trial, takes away no vested right nor impairs the obligation of any contract, and is, therefore, not unconstitutional; and can be applied to a case pending at the time of its passage.

2. **Practice, Trial:** POWER TO GRANT NEW TRIAL: MOTION FOR. In passing upon the question of granting a new trial, the trial court is not confined to the grounds set out in the motion, but independent of the motion may grant a new trial for any good cause.

3. **Practice, Appellate:** GROUNDS OF NEW TRIAL. The appellate court in reviewing the action of the trial court in granting a new trial is not confined to the grounds stated in the order of the court, but may also consider those set out in the motion for a new trial.

4. **New Trials:** NEWLY DISCOVERED EVIDENCE: AFFIDAVIT. In passing upon the question of granting a new trial newly discovered evidence will not be considered unless supported by affidavit.

5. **Practice, Appellate:** SETTING ASIDE VERDICT. An appellate court will only vacate a judgment as opposed to the weight of evidence where it is so strongly opposed to all reasonable probabilities as to be the manifest result of passion or prejudice.

6. **Evidence:** AGE: INTEREST OF DEFENDANT AS WITNESS: INSTRUCTION. It is not error to tell the jury, in passing on the question of whether defendant was of age at time of making the note in controversy, that they might consider his testimony in relation thereto, his interest in the result and his motive, if any, for his testimony.

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7. ———: UNCONTRADICTED: INSTRUCTION. On the record in this case, it was not error to tell the jury they were not bound to believe the declarations of any witness, because such declarations were uncontradicted; they might believe or disbelieve them as it might appear from all the facts to be true or untrue.

Appeal from the Carroll Circuit Court.—HON. E. J. BROADUS, Judge.

REVERSED AND REMANDED *(with directions)*.

Virgil Conkling, for appellant.

(1) The action of a trial court in sustaining a motion for new trial is no longer merely a matter of judicial discretion. Such action is now subject to review by the appellate courts, and new trials can only be granted for substantial legal reasons. When such reasons do not appear it is now the right of the appellate court to reverse the order for a new trial, and render judgment for the party who was successful in the trial court. Revised Statutes, 1889, sec. 2246, as amended in Acts of 1891, p. 70; *Taylor v. Scherpe*, 47 Mo. App. 257. (2) The statute requires the trial court to specify, in every order granting a new trial, the reason for which the same was granted. Revised Statutes, 1889, sec. 2241. When a trial court follows this statute and in such order specifies its reasons for its action, it will be presumed that the reasons therein recited are the only reasons which had any substantial existence, and the appellate court will only inquire into the sufficiency of such. *Burke v. City of Kansas*, 34 Mo. App. 570. (3) Defendants' motion for a new trial did not complain of the instructions given, and the lower court could not properly sustain the motion upon a ground which was not assigned therein. *Railroad v. Carlisle*, 94 Mo. 166; *Orr v. Rode*, 101 Mo. 399; *State v. Morton*, 42 Mo. App. 64; *Crow, Hargadine & Co. v. Stevens &*

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Mitchell, 44 Mo. App. 139. (4) There was no error in the instructions given to the jury. (5) While protesting that the appellate court should only inquire into the sufficiency of the reasons given by the trial court, we will, nevertheless, try to dispose of this suggestion. The allegations concerning newly discovered evidence were not accompanied by affidavits. (6) Their instruction number 2 called out plaintiff's instruction number 3, which the court very properly gave, and which declared to the jury the correct rule concerning such "uncontradicted" testimony as was given by E. J. Davis. *Vojta v. Pelikan*, 15 Mo. App. 475. (7) That this verdict is against the evidence, respondents will not be permitted to urge in this court. *McKay v. Underwood*, 47 Mo. 186; *Cook v. Railroad*, 56 Mo. 384; *Reed v. Ins. Co.*, 58 Mo. 429; *Whitsett v. Ransom*, 79 Mo. 258; *Adler v. Wagner*, 47 Mo. App. 25.

McPhetridge and *Hale & Son*, for respondents.

(1) We insist that this act is not retrospective in its operations, and is not applicable to motions pending at the time it took effect, and that this appeal should be dismissed. *State ex rel. v. Hays*, 52 Mo. 578. (2) If sufficient grounds for a new trial appear of record the action of the trial court in granting a new trial will not be disturbed, although the judge may have specified the wrong reason. *State ex rel. Brainerd v. Adams*, 84 Mo. 310. (3) Respondents, of course, had no control over the action of the judge in making his order. The reason given by the judge is not specified in the motion, and will the rights of respondents be prejudiced by this imperfect order of the court when ample ground for a new trial appears of record in this cause? We insist that they will not, and that no such construction will be given to the last clause of section 2241. (4) We

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admit that on appeal from final judgment in the cause that the only grounds considered by the appellate court would be those specified in a motion for a new trial or motion in arrest; but that this doctrine will not be applied on an appeal from a motion granting a new trial. (5) We insist that there was error in the instructions given by the trial court for appellant, and that the judge had the right to grant a new trial for the reason specified in the order. The first instruction was erroneous.

SMITH, P. J.—This was an action on a promissory note. Defendant, L. M. Davis, by his separate answer, pleaded payment, and the other defendant, E. J. Davis, for his defense pleaded infancy. There was a trial by jury resulting in a verdict for plaintiff.

The defendants filed a motion for a new trial upon the grounds: *First*, newly discovered evidence; *second*, verdict was against the evidence; *third*, verdict was against the instructions. Upon this motion the court made the following order: "Now come the parties by their attorneys, and defendants' motion for a new trial of this cause being taken up and fully considered is by the court sustained, because there was error in the instructions given to the jury." It thus appears that the ground upon which the court granted the new trial is not one of those mentioned in the defendants' motion. It is from the action of the court in granting the new trial the plaintiff has appealed. Session Acts, 1891, p. 70.

It appears from the record in the cause that, between the institution of the suit and the trial, the said act of 1891 took effect and became operative. It is contended by the defendants that the appeal was not authorized in this case by the said act of 1891, and that in order to make the act applicable a retro-

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spective operation must be given to it which is forbidden by the constitution. We do not think this contention can be maintained. The act is remedial in its scope and character. It allows an appeal to be taken from the action of a court in granting a new trial which before its enactment was not allowed under our code of procedure. That the general assembly may change the remedy in such cases there can be no doubt. Judge COOLEY in his Constitutional Limitations says: "As a general rule every state has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and create another. *It may give a new and additional remedy for a right already in existence. And it may abolish all remedies and substitute new.*" It is always within the power of the state to change the remedy so long as it does not essentially affect the right embodied in the contract, and that such change thus made does not infract the rule forbidding the impairment of contracts.

In *Hoffman v. Quincy*, 4 Wall. 535, it was declared by the supreme court of the United States that it is competent for the states to change the form of the remedy or to modify it otherwise as they may deem fit, provided no substantial right secured by the contract is thereby impaired. That provision of the bill of rights which prohibits the legislature from passing any law retrospective in its operation extends only to prohibiting legislation of a retrospective character which disturbs rights of a private nature. *State v. Kemper*, 9 Mo. App. 532; *Ins. Co. v. Hill*, 86 Mo. 466; *State v. County Court*, 34 Mo. 546; *State v. Hager*, 91 Mo. 452; *Porter v. Mariner*, 50 Mo. 364; *Willshear v. Kelly*, 69 Mo. 363; *Ins. Co. v. Flynn*, 38 Mo. 483; *Bolton v. Lansdown*, 21 Mo. 399; *Tennessee v. Sneed*, 96 Otto (U. S.) 69. It is too plain for argument that no vested

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right is taken away or impaired by the act, nor does it impair the obligation of any contract, so the defendants' objection is without force.

The trial court having granted the new trial on a ground of its own not suggested by the defendants' motion, by necessary and inevitable implication, did not grant it on any of the grounds of such motion. The statute imperatively requires a court in its order granting a new trial to specify the grounds therefor. Revised Statutes, sec. 2241.

There seems to be no limit on the power of the court to grant new trials on either of the grounds specified in section 2241, Revised Statutes, but, for the other grounds specified in section 2240, only one new trial can be granted. The record thus required to be made was no doubt intended to enable the court to keep itself advised of the grounds upon which any former new trial may have been granted.

The court had the inherent power, independent of the ground of defendants' motion, to grant a new trial for the cause specified in its order. *State ex rel. v. Adams*, 84 Mo. 311; *McCabe v. Lewis*, 76 Mo. 301; *Williams v. Circuit Court*, 5 Mo. 248; *Richmond v. Wardlaw*, 36 Mo. 313; *Simpson v. Blount*, 42 Mo. 542.

The question is whether or not on the appeal taken in pursuance of the act of 1891 we are restricted to an examination of the grounds upon which the court as shown by its order granted the new trial, or can we also look at the grounds of the motion of the defendant as well to the end that we may see whether the action of the court can be sustained on any one or all of these grounds. The order of the court may be proper, but the ground upon which it was made be improper. Our code of practice places parties to a suit in an appellate court on an equal footing. If we are restricted in our examination of the errors committed

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by the trial court to the ground or grounds of the new trial specified in the order of the court, and it shall turn out that we shall be of the opinion that the new trial was properly awarded, not for the reason specified in the order of the court, but for one or more of those alleged in defendants' motion, we would be compelled to reverse the order when it ought to be sustained. In such case the defendants would be precluded from having the benefit of the grounds of their motion even though confessedly valid. In reversing the order sustaining the motion, then the court in disposing of it again might be of the opinion that it ought to be sustained for some ground therein alleged, and should so rule, then the plaintiff would again have to present his appeal to have the action of the court on the motion reviewed, or, if the court should overrule the motion, and the defendants after judgment should appeal, the grounds of the motion would in that case come up for review in that way. This reduces the argument, that we are restricted in this appeal to an examination of the ground for a new trial specified in the order of the court, to a palpable absurdity. We think in a case of this kind our review of the action of the court may extend to all the grounds of the motion just as if the action of the court had been the other way, and the defendants were appealing. And we are unable to see anything in the innovating act of 1891, requiring a different rule of practice. *Taylor v. Scherpe*, 47 Mo. App. 257. So that the question which we feel obliged to decide is whether the order of the court granting the new trial can be sustained on any one of the grounds contained either in the motion of defendants or the order of the court. As to the first ground of the defendants' motion for a new trial, it is sufficient to say that it was not supported by affidavits, and, therefore, we cannot notice it. *State v. Jewell*, 90 Mo. 467;

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Culbertson v. Hill, 87 Mo. 553; *Meechum v. Judy*, 4 Mo. 361.

As to the second ground it may be remarked that appellate courts may vacate judgments as opposed to the weight of the evidence in those cases where the verdict of a jury or the court sitting as a jury is so strongly opposed to all reasonable probabilities as to be the manifest result of passion or prejudice. *Adler v. Wagner*, 47 Mo. App. 25. A critical examination of the evidence does not convince us that the defendants' case is within this rule, so that the second ground of defendants' motion cannot be sustained.

And as to the third ground of the motion it is manifestly without the slightest merit.

This brings us to the consideration of the ground assigned in the order of the court for a new trial, which is that the court erred in the instructions. It is contended by defendants that the plaintiff's first instruction, which informed the jury that if they found that there was a balance due plaintiff on the note sued upon that they should find against the defendant, E. J. Davis, unless they believed from the evidence that he was under the age of twenty-one years at the time of the execution of the note, and in determining the question of his age that they might consider his testimony in relation thereto, his interest in the result of the suit and his motive, if any, for his testimony given in the case, is erroneous. In view of the statute, section 8918, and the rulings of the supreme court (*State v. Musick*, 101 Mo. 260; *State v. Strattman*, 100 Mo. 540; *State v. Brooks*, 92 Mo. 542; *State v. Jones*, 78 Mo. 278; *State v. Owens*, 78 Mo. 367; *State v. Harrod*, 102 Mo. 590), we think that the court did not err in the giving of this insruction.

In respect to the plaintiff's third instruction (no objection being urged against his second), which told

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the jury that they were not bound to believe the declarations of any witness on the stand because such declarations were uncontradicted; they might believe or disbelieve them as it might appear from all the facts and circumstances in evidence to be true or untrue, this instruction seems to have been asked to meet one given for defendant to the effect that the evidence was uncontradicted, that said defendant, E. J. Davis, was under the age of twenty-one years at the date of the execution of the note. The jury are the exclusive judges of the credibility of witnesses, and when they have refused to believe affirmative testimony, although uncontradicted, such testimony must be of a very clear and undoubted character, probable in itself and unattended with suspicion in order to warrant the holding that a jury is obliged to believe it and render a verdict in accordance with it. *Vojta v. Pelikan*, 15 Mo. App. 475. From this it seems to us that the instructions of the plaintiff and defendant afforded an intelligent rule for the guidance of the jury. The testimony of the defendant as to his age was, in our opinion, of not a very clear and undoubted character probable in itself, and unattended with suspicion. The jury was properly enough left to decide for itself whether it should give credence to such testimony or not.

We have been unable to discover any fatal conflict or inharmony in the instructions which justified the court in its action in granting a new trial. It results that the order of the court will be reversed with directions to reinstate the verdict and enter judgment thereon accordingly. All concur.

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THE AULTMAN & TAYLOR COMPANY, Plaintiff in Error, v. C. K. SMITH, Defendant in Error.

Kansas City Court of Appeals, January 16, 1893.

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1. **Principal and Surety:** EXTENDING TIME: CONSIDERATION. In order to discharge a surety, an agreement between the creditor and the principal debtor extending the time of payment must be upon a valuable consideration and for a definite time, and so bar the action of the creditor during such time, and preclude the surety from asserting his right in court.

2. **Practice, Appellate:** ABSTRACT: EVIDENCE: INSTRUCTIONS. The appellate court will not consider objections to instructions which require an examination of the evidence where the abstracts present mere excerpts from the evidence.

3. **Principal and Surety:** RESORT TO COLLATERAL SECURITY: SUBROGATION: COMMON ERROR. A surety cannot compel the creditor to exhaust liens and collaterals before he can look to the personal liability of the surety, who can pay his debt and avail himself of the liens, rights and advantages of the creditor; but, appellant having adopted such theory in his instructions, is estopped to complain thereof.

4. **Instructions:** EXTENDING THE ISSUES. An instruction, though well enough in itself, which exceeds the limits of the defense pleaded in the answer, is fatally vicious.

5. **Practice, Appellate:** ERROR, NON-PREJUDICIAL: INSTRUCTION. An instruction justly subject to criticism will not reverse unless it specially operated to the prejudice of the complaint.

Appeal from the Bates Circuit Court.—HON. CHAS. W. SLOAN, Judge.

REVERSED AND REMANDED.

Henry Wollman and *Alexander New*, for plaintiff in error.

(1) The first instruction given on behalf of the defendant is erroneous. The law in this state is, that

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in order to release the surety the extension must not only have been for a valuable consideration, but must also have been for a definite period of time. *West v. Brison*, 99 Mo. 684, 693. (2) The instruction is bad, for the further reason that there was no proof at all that there was a valuable consideration moving to plaintiff for the extension, and nothing in the evidence to base this instruction on. 2 Benjamin on Sales [4 Am. Corbin's Ed.] sec. 1004; *Moser v. Hock*, 3 Pa. St. 230; *Brown v. Kirk*, 20 Mo. App. 524; *Russell v. Brown*, 21 Mo. App. 51; *Hartman v. Redman*, 21 Mo. App. 124. (3) The second instruction given for defendant is erroneous. The court tells the jury that defendant Smith has a right to prove by "verbal or parol evidence" in what capacity he signed the notes sued on, whether as principal or surety. We cannot understand what the jury has to do with knowing what kind of testimony is admissible, or what kind of testimony ought to be rejected. *Jones v. Roberts*, 37 Mo. App. 163, 175, 176; *Jones v. Jones*, 57 Mo. 138; *Weil v. Schwartz*, 21 Mo. App. 372, 382; *Copp v. Hardy*, 32 Mo. App. 588, 593; *State v. Smith*, 53 Mo. 267, 271. (4) A surety on a note secured by mortgage cannot compel the holder to exhaust the mortgage security before proceeding against him. The holder of a note has a right to pursue any course he sees fit. *Bank v. Terry*, 13 Mo. App. 99; *Allen v. Dermott*, 80 Mo. 56; *Allen v. Woodward*, 125 Mass. 400. (5) An instruction must never be broader than the pleadings and the evidence. *Waddinghaus v. Hulett*, 92 Mo. 528; *Fairgrieve v. Moberly*, 29 Mo. App. 141, 154. (6) Plaintiff was entitled to instruction number 3 which the court refused. Brandt on Suretyship & Guaranty, sec. 17, p. 21, and authorities cited; *Wilson v. Foot*, 11 Metc. 285.

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No brief for defendant in error.

Smith, P. J.—In 1882 plaintiff, Aultman & Taylor Company, sold some machinery to James Nestlerode and Zenos Smith (a brother of defendant, C. K. Smith), and took notes of the two Smiths and Nestlerode for the purchase price. In 1884 defendant Smith and Nestlerode, who together then had possession of the machinery, wanted to sell it to Braxton Bros., but could not, as plaintiff had a mortgage on it. In order to enable Smith and Nestlerode to sell the machinery, an extension was given and new notes were taken. All the notes were signed on their face by Braxton Bros., James Nestlerode and C. K. Smith. These notes were secured by chattel mortgage from Braxton Bros. on the machinery and on some horses and mules. The notes were executed on July 16, 1884, and were secured by chattel mortgage executed and acknowledged on July 21. Defendant, C. K. Smith, in his answer, claims that he signed the notes simply as surety, and that afterwards an extension was granted by plaintiff to the Braxtons on the notes given in 1884, because the Braxtons assured the plaintiff company that they would release it from the expense incurred in repairing the machinery that they had purchased from Smith and Nestlerode. Defendant, Smith also claims in his answer that plaintiff was required to first exhaust its mortgage security before holding him on the notes as surety. Plaintiff did not foreclose its mortgage, but sued on the notes. There was a trial which culminated in judgment for defendant, and plaintiff appeals.

The errors alleged to have been committed by the circuit court, of which plaintiff complains, arise out of the action of that court in the giving and refusing of instructions. The first of these is as to the giving

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of defendant's first instruction, which directed the jury that if the defendant Smith signed the notes sued on as surety only and not as principal, and that plaintiff, for a valuable consideration agreed with the principal of said notes or either of them, to extend the time of the payment of the said notes, and that such extension of time was without the consent of the defendant Smith, then the jury should find the issues for him. This instruction misdirected the jury as to the law of the case. There is no rule of law more firmly settled in this state than that, where the surety claims to have been discharged by reason of an agreement between the creditor and the principal debtor extending the time of payment, it must appear that the agreement was upon a valuable consideration, and that the extension was for a definite period of time. *Russell v. Brown*, 21 Mo. App. 51; *West v. Brison*, 99 Mo. 693. The giving of time which will discharge the surety is not the mere promise of indulgence, but it is the act of the creditor depriving himself of the power of suing by something obligatory which precludes the surety from coming into a court of equity for relief, because the principal, having tied his own hands, the surety cannot release them. *Nichols v. Douglass*, 8 Mo. 49; *Hartman v. Redman*, 21 Mo. App. 124; *Brown v. Kirk*, 20 Mo. App. 524. Testing the said instruction by this rule, and it becomes quite manifest that it is radically erroneous in its enunciation, and should not have been given.

We must decline to consider the plaintiff's other objection to this instruction, for the plain reason that it involves an examination of the testimony which is not presented by the record before us. The plaintiff has contented itself with the presentation of mere excerpts from the testimony, which, under repeated rulings made by us, we cannot notice. *Goodson v.*

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Railroad, 23 Mo. App. 76; *State v. Pace*, 34 Mo. App. 458; *Nichols v. Nichols*, 39 Mo. App. 291; *Deering v. Collins*, 38 Mo. App. 80; *Cuomo v. St. Joseph*, 24 Mo. App. 567; *Hyatt v. Wolf*, 22 Mo. App. 191; *Foster v. Trimble*, 18 Mo. App. 394; *Calvert v. Bates*, 44 Mo. App. 626; *Bank v. Davidson*, 40 Mo. App. 421; *Hattan v. Mining Co.*, 40 Mo. App. 448.

The plaintiff further objects that the trial court erred in telling the jury by defendant's third instruction that, if about the time of the extension of the notes sued on and as a part of the transaction, the Braxton Bros. executed a chattel mortgage on certain property described therein to secure the notes sued on, and if C. K. Smith only signed said notes as security, and that the plaintiff negligently suffered the property described in said chattel mortgage or any part thereof to be diverted from the purpose or lost as a security, or converted any of the same to its own use, by reason of which said property or any part thereof was lost as a security, then they should credit C. K. Smith with the reasonable value of the property, if any, so negligently lost or diverted or converted by plaintiff, and if they further found that the property, if any, so negligently lost or diverted from its purpose as a security, or converted by plaintiff, equaled or exceeded the amount of said notes at the time of such diversion, loss or conversion by plaintiff, they would not find any amount against C. K. Smith. As we understand it the converse of the rule announced in this instruction has been for a long time the well-recognized law in this and other jurisdictions. A surety cannot compel the creditor to exhaust liens and collaterals before he can look to the personal liability of the sureties. A creditor is free to take his choice and may enforce his debt without enforcing his lien. The surety is protected. He can be subrogated to the security of the creditor

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when he has performed his contract. *Bank v. Terry*, 13 Mo. App. 99; *Allen v. Dermott*, 80 Mo. 56; *Allen v. Woodward*, 125 Mass. 400; *Geddis v. Hawk*, 1 Watt. 280. In the present case it was the duty of defendant Smith to pay the notes, and then he would have had a right to avail himself of the liens, rights and advantages of the plaintiff against the other defendants, who had executed the mortgage. *Allen v. Dermott, supra; Watson v. Sutherland*, 1 Tenn. Ch. 208.

Again, the instruction further directed the jury that, if the plaintiff converted any of the mortgaged property to its own use, then defendant Smith was entitled to a credit for the reasonable value of such property. This no doubt would have been well enough were it not that the answer interposed no such defense. The instruction in this respect exceeded the limits of the defense pleaded in the answer, and was for that reason vicious and fatal to the judgment. *Wright v. Fonda*, 44 Mo. App. 634; *George v. Railroad*, 40 Mo. App. 433; *Moffatt v. Conklin*, 35 Mo. 455; *Bank v. Murdock*, 62 Mo. 73; *Glass v. Gelvin*, 80 Mo. 302; *Fulkerson v. Thornton*, 68 Mo. 469; *Nugent v. Curren*, 77 Mo. 328; *Hassett v. Rust*, 64 Mo. 328; *Crews v. Lackland*, 67 Mo. 621; *Lenox v. Harmon*, 88 Mo. 495; *Waldern v. Railroad*, 71 Mo. 516; *Merritt v. Poulter*, 96 Mo. 240; *Noll v. Railroad*, 97 Mo. 74; *Bender v. Dungan*, 99 Mo. 130.

The evidence not having been set forth in the abstract, as already stated, we cannot determine whether the plaintiff's first instruction should have been given or not.

The plaintiff's third instruction, which was refused, declared that, if the jury found that upon the face of the note the name of defendant Smith appeared as principal and not as surety, then before he could prove his suretyship to the detriment of plaintiff,

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and for the purpose of claiming his discharge by reason of the negligence of plaintiff in not foreclosing the chattel mortgage, he must establish, not only the fact that the other signers upon said note knew and recognized him to be only security on said note, but must further prove that said fact was at the making of said note known to plaintiff or its authorized agent. This instruction was properly refused as must be apparent in view of what has been already said in respect to the defendant's third instruction. The error of this instruction is similar to that there noticed; and which would be sufficient to estop the plaintiff from complaining of the judgment were it not for other errors that supervened at the trial of the case.

It may not be out of place to state in conclusion, that, while the criticism made by plaintiff on the defendant's second instruction is not unjust, we would not feel at liberty to reverse a judgment on that account, unless we could discover that the giving of it had specially operated to the prejudice of the complainant. Such an instruction, it is needless to say, should not be given in any case.

It must inevitably follow that the judgment should be reversed and the cause remanded. All concur.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Appellant, v. LIZZIE SIMONS *et Vir*, Respondents.

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Kansas City Court of Appeals, January 16, 1893.

1. **Contracts:** CONFLICT OF LAWS: VALIDITY. The validity of a contract,—whether as to the form or manner of its execution, or as to the capacity of parties,—should be determined by the law of the state where the same is entered into, and, if valid there, it is valid everywhere; and this rule alike governs the disabilities of coverture, infancy, etc.

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2. ——: ——: WHERE MADE: DELIVERY: MARRIED WOMAN. A note made by a married woman dated in Kansas, executed in Missouri, was sent to and delivered in Kansas. *Held,* a Kansas contract, as it was the delivery that completed the contract and gave it life; and it, therefore, bound the maker according to the laws of Kansas, which would be enforced in the Missouri courts.

Appeal from the Vernon Circuit Court.—HON. D. P. STRATTON, Judge.

REVERSED AND REMANDED.

Cory & Hulbert, for appellant.

(1) The note was a Kansas contract. *Stix v. Matthews,* 63 Mo. 373; s. c., 75 Mo. 96; *Butler v. Meyer,* 17 Ind. 77; *Waldron v. Richings,* 3 Daly (N. Y.) 288; 9 Abbott's Practice Reports (N. S.) 359; *Staples v. Nott,* 28 N. E. Rep. 515; *Bank v. Southwick,* 67 How. Pr. 324; *Gay v. Rainey,* 89 Ill. 221; 31 Am. Rep. 76; *Cook v. Moffatt,* 5 How. Pr. 295; *Marvin v. McCullum,* 20 Johns. 288; *Briggs v. Latham,* 36 Kan. 255; *Hiatt v. Bank,* 8 Bush (Ky.) 193; *Huthsing v. Bosquet,* 17 Fed. Rep. 54. (2) The note being a Kansas contract, it must be governed by Kansas law. *Evans v. Cleary,* 125 Pa. St. 204; 17 Atl. Rep. 440; *Hill v. Chase,* 143 Mass. 129; 9 N. E. Rep. 30; *Baum v. Birchall* (Sup. Court Pa. July 13, 1892), 24 Atl. Rep. 620; *King of Prussia v. Kuepper,* 22 Mo. 550; *Stix v. Matthews,* 75 Mo. 96; *Dodge v. Coffin,* 15 Kan. 277; *Railroad v. Maltby,* 34 Kan. 125; *Crooker v. Pearson,* 41 Kan. 410; *Hamilton v. Railroad,* 39 Kan. 56; Story on Conflict of Laws, secs. 102–3, 242–8; *Beckham v. Tootle, Hanna & Co.,* 19 Mo. App. 596; *Hach v. Hill,* 106 Mo. 18; *Roach v. Type Foundry,* 3 West Rep. (Mo.) 186; *Bell v. Packard,* 69 Me. 105; 31 Am. Rep. 251; *Milliken v. Pratt,* 125 Mass. 374; 28 Am. Rep. 241; *Bank v. Hutchinson,* 81 N. Y. 566. (3) Respondent

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made the contract in Kansas. She cannot now plead coverture in a Missouri court. *Andrews v. His Creditors*, 11 La. 464, 476; *Bowen v. Bradley*, 9 Abb. Pr. (N. S.) 395; *Huthsing v. Bosquet*, 17 Fed. Rep. 55.

Burton & Wright, for respondent.

(1) At common law and under the law of Missouri, at the time the note sued on was executed by respondent, coverture operated as a legal disability to contract, and all contracts of a married woman were absolutely void at law. No personal judgment, or judgment at law, could be rendered against her. *Chouteau v. Merry*, 3 Mo. 182; *Bauer v. Bauer*, 40 Mo. 61; *Higgins v. Peltzer*, 49 Mo. 152; *Lincoln v. Rowe*, 64 Mo. 139; *Weil v. Simmons*, 66 Mo. 618; *Shroyer v. Nickell*, 55 Mo. 267; *Davis v. Smith*, 75 Mo. 225–7; *Music v. Dodson*, 76 Mo. 624–5; *State to use v. Kevill & Waples*, 17 Mo. App. 144; *Bachman v. Lewis*, 27 Mo. App. 87; *Brumback v. Weinstein*, 37 Mo. App. 523–4; *Saulsbury v. Corwin*, 40 Mo. App. 373. (2) If respondent could not make any contract that would bind her at law, how can she be said to have made a contract by which she was bound under the laws of Kansas and in a Missouri court? The note sued upon was as to respondent not a "Kansas contract;" it was not a contract at all. The authorities above cited; 3 American & English Encyclopedia of Law, 518, par. "f," and note 3; *Milliken v. Pratt*, 125 Mass; 28 Am. Rep. 249. (3) The fact the promise of Mrs. Simon may have been acted upon by the appellant does not estop respondent from denying the validity of the promise on the ground of her inability to contract. *Saulsbury v. Corwin*, 40 Mo. App. 373.

Gill, J.—The basis of this action is a promissory note, with interest coupons attached, purporting to

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have been executed at Fort Scott, Kansas, July 1, 1885, and signed by defendant, Mrs. Simon, Sol Simon, her husband, and other parties. In addition to the matters of ordinary promise to pay, etc., the note contains this clause, to-wit: "It is further agreed and declared, that this note and the coupons hereto attached are made and executed under, and are in all respects to be governed and construed by, the laws of the state of Kansas, and are given for an actual loan of $1,200." The ground of defense is, that Mrs. Simon was at the date of the note a married woman residing at Nevada, Missouri, and that she signed the note at Nevada. She claims, therefore, that under the law as it then existed in Missouri she could not make a binding contract and is not for that reason liable. At the trial the court sitting as a jury made the following finding of facts:

"*First.* The plaintiff is a Connecticut corporation with its principal place of business in Hartford, Connecticut. The Union Loan & Trust Company is a corporation with its head office at Fort Scott, Kansas. It was in 1885 known as the Van Fossen & Wilcox Loan & Real Estate Bank, and is the successor to the business of the firm of Van Fossen & Wilcox of the same city. *Second.* On July 1, 1885, defendants, Sol Simon and Lizzie Simon, were and they still are husband and wife, and lived in Nevada, Missouri, where they still live. *Third.* On the above date Sol Simon and one A. M. Huff borrowed $1,200 from the plaintiff, and executed the note sued upon herein to secure its payment. Defendant, Lizzie Simon, signed the note simply because her husband asked her to do so, and because the plaintiff required it. *Fourth.* A solicitor of plaintiff, living at Nevada, Missouri, took defendants', Sol. Simon's and A. M. Huff's, written application for the loan sent it by mail to the Van Fossen & Wilcox Loan & Real Estate Bank at Fort Scott, which com-

pany was agent of plaintiff. Said company at Fort Scott investigated the circumstances of the proposed loan, approved the same, and sent the papers to plaintiff at Hartford, Connecticut, by mail. The defendant, Lizzie Simon, did not sign said application, nor is there any evidence to show that she knew anything about it. The plaintiff approved the same and returned the papers with the money to said company at Fort Scott. Said company made out the note ready for signature and sent it to the solicitor at Nevada. Defendants each signed it at Nevada, Missouri, and it was then sent to said company at Fort Scott by mail. Said company approved the note as signed, and sent the money by express to defendant, Sol Simon, at Nevada, Missouri. *Fifth.* Said solicitor had no power to approve said application and approve the loan, or to approve the papers when signed. *Sixth.* At the date mentioned, at all times since, under the laws of Kansas, a married woman could lawfully make contracts, transact business, sue and be sued, and conduct all transactions of a business nature, exactly as a *feme sole* or a man. At that time a person, under the laws of Kansas, could lawfully contract for the payment of twelve per cent. interest, and the same could be collected by law. *Seventh.* The said note now amounts to $2,140.85, and bears twelve per cent. interest and is unpaid."

To the finding of these facts no objections were made or exceptions taken. Over the plaintiff's objections the court declared the law as follows: "Lizzie Simon, being a married woman at the date mentioned, was incapable of making such a contract as that sued on, and she is not bound by it." And, thereupon, a judgment was entered against Sol Simon, but in favor of defendant, Lizzie Simon, and the plaintiff appealed.

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When the defendant, Mrs. Simon, signed this note at Nevada, Missouri, married women were in this state still under the common-law disability and incapacitated to make such a contract, while under the laws of the state of Kansas she was clothed with full power so to do, as a *feme sole*. If then the responsibility of this married woman is to be determined by the laws of Kansas, as they were then and now, then she should be held on this note. But if on the other hand we are to measure her liability by the laws of Missouri, as they existed in 1885, then the defendant, Mrs. Simon, is not bound on the instrument sued on. Here then we have the turning point in this case. It seems quite universally declared, that under the common law of comity the validity of a contract, whether as to the form or manner of its execution, or as to the capacity of the parties, should be determined by the law of the state where the same is entered into, and, if the parties are bound by it there, then they are bound thereby everywhere, and the courts will so respect the foreign law as to enforce such agreements, even though if they had been made *sub lege fori* such contracts would be null and void. This rule is of equal force whether the disability arises from coverture, infancy or other causes. If then the note here in suit is to be regarded a *Kansas contract*, that is, one made in that state, then clearly under the laws of that commonwealth, the defendant would be held liable by the courts of that state. And it is equally plain she should in that event be likewise charged by the courts of Missouri.

Now in our opinion the facts above stated show this note to have been made in Kansas and not in Missouri. The instrument is dated at Fort Scott, Kansas, was signed at Nevada, Missouri, but *delivered* to the plaintiff at Fort Scott, Kansas. It then became a completed contract at its *delivery*, and not before.

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The mere signing the paper did not make or locate the contract. It was the subsequent delivery that first gave it life. Until the instrument signed at Nevada, Missouri, had reached the plaintiff's agent at Fort Scott and was by them received and approved the contract was incomplete. Before that there was no perfected obligation because no delivery. The solicitor at Nevada had no authority to pass on the paper, he was a mere conduit or middle man through which the parties negotiated. He only took the note, after it was signed at Nevada, and passed it to the company at Fort Scott for their action. The delivery was only complete when these agents of the plaintiff in Kansas received it. It was these agents at Fort Scott who had authority from the plaintiff to close up the loan, and pay the money. They did receive the note sent to them from Nevada, Missouri, and then consented to and did pay over the money which they had been authorized to loan. The *lex loci contractus* was then fixed. It was at Fort Scott, Kansas, and not at Nevada, Missouri. The foregoing propositions are amply supported by eminent judges and text-writers. *Milliken v. Pratt*, 125 Mass. 374, and cases cited; *Hill v. Chase*, 143 Mass. 129; *Gay v. Rainey*, 89 Ill. 221, 225; *Butler v. Meyer*, 17 Ind. 77; *Bell v. Packard*, 69 Me. 105; *Lawrence v. Bassett*, 5 Allen, 140; *Baum v. Birchall*, 24 Atl. Rep. 620; *Thompson v. Ketcham*, 8 Johns. (N. Y.) 190; *Greenwood v. Curtis*, 6 Mass. 377; *Scudder v. Bank*, 91 U. S. 406, 412; Story on Conflict of Laws [8 Ed.] 842; *Stix v. Matthews*, 63 Mo. 373.

Judgment reversed and cause remanded. All concur.

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BANKING HOUSE, Appellant, v. C. B. BROOKS, Respondent.

Kansas City Court of Appeals, January 16, 1893.

1. **Chattel Mortgage:** OWNER: POSSESSION: SUBSEQUENT MORTGAGE. Where one is in possession of personal property and exercising acts of ownership over it by mortgaging it, it may, nothing else appearing, be legitimately inferred that he is the owner, though such mortgagee's title would not prevail over that of a subsequent mortgagee from the real owner..

2. **Conversion:** ACT INCONSISTENT WITH OWNER'S RIGHT. An act inconsistent with the owner's right, as a refusal to give up a mare, except at the end of a replevin suit, is sufficient to make out a case of conversion.

Appeal from the Vernon Circuit Court.—HON. D. P. STRATTON, Judge.

REVERSED AND REMANDED.

January & Lindley, for appellant.

(1) If there is any evidence tending to prove the cause of action, a peremptory instruction is erroneous. (2) Possession is some evidence of title. (3) The recital in plaintiff's chattel mortgage "now in my possession," being descriptive of the animal mortgaged, is evidence even against a third party that the mare was in the possession of the mortgagor if it be conceded that E. J. Beougher mortgaged the mare in controversy.

Stone, Hass & King for repondent.

(1) The foregoing testimony is all omitted from the appellant's abstract, and, but for that fact, we would not have deemed it necessary to have replied to appel-

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lant's brief at all, as the law is clear that there can be no conversion unless the party complained against does something clearly in violation of the rights of the plaintiff. The testimony is undisputed that respondent sold the property subject to the appellant's claim, and unless he sold it with intent to appropriate it to his own use, or to some other person's than the owner's, it is not a conversion. *Thurston v. Blanchard*, 22 Pick. (Mass.) 18; *Durrell v. Mosher*, 8 John. (N. Y.) 445; *Davis v. Duncan*, 1 McCord (S. C.) 413: *Koch v. Branch*, 44 Mo. 542.

Ellison, J.—Young Beougher executed a chattel mortgage on a black mare to plaintiff. He and old Beougher afterwards jointly executed a chattel mortgage to defendant. Defendant got possession of the mare and sold her under his mortgage, and plaintiff has now sued him in conversion. The trial court instructed that there was no evidence tending to show any right, title or interest in the mare in young Beougher, and on this ground the finding should be for defendant. Plaintiff appeals.

There was no affirmative testimony that the mare was owned by either of the Beoughers. There was evidence, however, tending to show that when the young man gave the mortgage he was in possession of the mare, and that defendant recognized this mortgage as a prior mortgage to his; that in taking his he had it executed by *both* the old and young man. In this connection defendant testified that when he took his mortgage he did not know who owned the mare. "I heard them talking among themselves that one owned this, and another owned that, and I told them they had all better sign the mortgage." It further appeared that he admitted plaintiff's prior mortgage, and again that he sold subject to it. Where one is in possession

of personal property and exercising acts of ownership by mortgaging it, it is evidence, nothing else appearing, from which you may legitimately infer that he is the owner. *Estes v. Springer*, 47 Mo. App. 99. If on a trial it should be believed to be a fact that the young man did not own the mare, when he gave the mortgage, plaintiff, of course, would have no case.

In regard to the conversion, the evidence tended to show that defendant refused to give up the mare except at the end of a suit in replevin adverse to him. This was sufficient to make out a case of conversion. It was an act inconsistent with plaintiff's right. And, notwithstanding he asserted at the sale that he was selling subject to plaintiff's mortgage and recognized such mortgage, yet he wilfully refused to turn over the property. He spoke in recognition of it, but both spoke and *acted* in antagonism to it. *LaFayette Co. Bank v. Metcalf*, 40 Mo. App. 494, 501. The judgment is reversed, and the cause remanded. All concur.

SAVANNAH L. WATSON, Respondent, v. THE KANSAS & TEXAS COAL COMPANY, Appellant.

Kansas Court of Appeals, January 16, 1893.

52 366
54 482

52 366
58 197

52 366
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52 366
68 388
69 261
71 518

52 366
76 520

1. **Master and Servant:** ASSUMPTION OF RISK. If a servant, capable of contracting, with notice of the risk undertakes a hazardous employment, the master incurs no liability for injuries received therefrom.

2. ———: ———: DEFECTIVE MACHINERY: LATENT AND PATENT. If the servant knows the machinery or implements he uses are defective and continues to use it, he assumes the risk, but he is not required to search for latent defects, but may assume the machinery sufficient; however, he must observe patent defects, and opportunity to know defects is counted to him as knowledge thereof.

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3. ———: ———: KNOWLEDGE OF DANGER. A servant does not assume the risk unless he knows not only the condition of things, but also the danger that exists in such condition; but, if the danger is obvious, the condition need only be shown.

4. ———: ———: ———. An experienced miner of mature years is presumed to know what common observation teaches, *e. g.*, the operation of gravitation, the effect of blasting on columns, stubs and roof of a mine, and the danger of a loosened rock in the roof; and where the danger is as well known to the servant as to the master the former assumes the risk.

Appeal from the Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED.

Lee, McKeighan, Ellis & Priest, for appellant.

(1) The demurrers to the evidence should have been sustained. If the servant has the same knowledge of the risk that an inspection would reveal to the master's inquiry, and continues at his work without complaint, he cannot recover if hurt. *Hayden v. Mfg. Co.*, 29 Conn. 548; *Ballon v. Railroad*, 54 Wis. 259; *Porter v. Railroad*, 71 Mo.; *Anderson v. Clark*, 29 N. E. Rep. 589; *Heath v. Coal Co.*, 65 Iowa, 737, and authorities *supra*. (2) The deceased knew of the condition of the rock, continued to work without complaint, and, therefore, assumed the risk of injury from it. *Anderson v. Clark*, 29 N. E. Rep. 589; *Aldridge v. Glass Co.*, 78 Mo. 559; *Oleson v. McMullen*, 34 Minn. 94; *Dist. of Columbia v. McElligott*, 117 U. S. 621.

W. H. Sears and *Ben Eli Guthrie*, for respondent.

SMITH, P. J.—Action by plaintiff to recover for the death of her husband occurring while he was employed in the defendant's coal mines at Ardmore in Macon county. A stone from the roof of the mine fell

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upon him and crushed him to death. Plaintiff complains that the defendant knew that the roof was unsafe at the particular place from which the rock fell, and negligently failed to secure it against falling, or was negligent in not knowing of its insecure condition. The defendant answers disclaiming any fault on its part and averring that the accident was a risk incident to the nature of the service, and that the death of the deceased was occasioned by his own and the negligence of his fellow employes.

The uncontradicted evidence tends to establish these facts: That the deceased was an experienced coal miner and had been engaged for some time in the mines where he met his death. The work at which he was engaged at the time of his death required skill and was hazardous, so much so that only expert miners would undertake it for an increased compensation. The strata of coal at these mines outcrop on the surface, and the main entry is driven in on a slant following the lay of the vein of coal. The exploration in the virgin bed of coal thus made is called the "main entry," off from which is driven the other ways called "cross entries." These cross entries are driven back in the coal bed at right angles with the main entry, and from either side of it are formed by the excavation of the coal what are called "rooms." Between each of these rooms are left pillars to support the roof, until the whole field has been by this process of excavation stripped of coal. When this has been accomplished the pillars are drawn, and the roof allowed to cave in, and that part of the workings abandoned.

A cross entry had been driven in at the mine where the deceased was at work, and upon it on either side rooms had been made by the excavation of the coal, and the pillars at this cross entry between the rooms were ready to be drawn. The length of the cross

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entry was something over three hundred feet. The rooms are about thirty feet from center to center. The deceased and his partner had undertaken to draw the pillars and stubs, the stubs being that part of the pillar which adjoins the entry. They were to be paid fifty cents per ton for doing so. That work, although more hazardous, was more profitable, both on account of the extra compensation and the ease with which the coal was gotten out. Larger results were obtained with less powder. They had drawn some pillars between the rooms at the remotest end of the entry, and were proceeding to draw a stub between the other rooms when the accident occurred. They had been at this work some days. A short time before the accident, a shot or blast had been made, and at the time of the accident Fox was drilling a hole, in which to put another blast. Their tools were laid a short distance from them in the entry, and Watson was standing near by his tools, when a stone, weighing about a ton and a half, in a loaf shape, the convex part at the top fell upon him. That part of the stone which was exposed in the roof was flat; the concealed part was oval, coming out to a feather edge.

Some days before the accident, both Fox and Watson had noticed a seam from which the rock broke away, and had surmised that it was scaling down; sounded it and found that it sounded like a drum, but concluded that it would remain safe until after they had gotten through with the work of drawing pillars and stubs. It was shown without contradiction that it was the duty of miners, in doing this kind of work, to protect themselves against the caving in of the roof, by using props which were furnished them at the mouth of the entry.

The only witness for the plaintiff, Mr. Eaton, testified that the roof of the entry in which the accident

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happened was sound and solid with the exception of one place where Watson was killed, and that to the best of his knowledge the roof at this point had been bad about three months, and that about two weeks before the accident he saw a man wedge the rock, whom he recognized to be a day hand, employed by the defendant company, but, as the rock did not come down, he knocked out his wedges and let it hang, without being propped or cross-barred. All of the men who were employed by the day, and whose duty it was to look to the security of the entries, were called as witnesses and each testified that he made no effort to wedge the rock, take it down, or prop it up; that they knew nothing of the dangerous condition of this stone.

At the conclusion of the whole case the defendant asked an instruction in the nature of a demurrer to the evidence which was overruled. Plaintiff had judgment and defendant appealed. The only question thus presented by the record for our decision arises out of the action of the trial court in overruling the defendant's demurrer to the evidence.

It is a familiar principle, that, if a servant capable of contracting for himself, and with full notice of the risk he may run, undertakes a hazardous employment, no liability is incurred by the master for injuries received from these hazards. The rule has been well settled by a long and unbroken line of judicial decisions in this state to the effect that, if the defect in the machinery or implement be known to the employe, and he will still enter into the employer's service, he takes upon himself the risk incident to such defect, and cannot recover damages for the injury he may receive attributable to such defect. *Porter v. Railroad*, 71 Mo. 66, and cases there cited. On the other hand, it is equally well settled that it is not incumbent upon the employe to search for latent defects in machinery or implements

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furnished him by the employer, but that without such investigation he has the right to assume that they are safe and sufficient for the purpose. *Porter v. Railroad*, 60 Mo. 161; *Lewis v. Railroad*, 59 Mo. 506; *Gibson v. Railroad*, 46 Mo. 163. If, however, the defect is patent, open to observation or such as the ordinary use of the machine, in the business the servant is engaged in, would disclose to an ordinarily observant man, operating it, before being injured, to observe the defect, his opportunity to know would be held as knowledge, whether in fact he knew of the defect or not. *Keegan v. Kavanaugh*, 62 Mo. 232; *Hulett v. Railroad*, 67 Mo. 239.

In *Aldridge v. Furnace Co.*, 78 Mo. 559, where the cause of action stated was, while plaintiff was at work by the defendant's direction in the Millsap bank at the foot of an embankment or wall of earth, four feet back from the face of which was a crevice partially separating the embankment from the body of the surrounding earth, the embankment fell upon him and injured him by reason of defendant's failure to secure it by the use of shores or props, and that plaintiff was ignorant of the crevice, and the defendant was not, etc. The ignorance of the deceased was denied by the answer. In that case it was said "If the deceased did know of the existence of the seam or crevice and the consequent danger, or if it was so patent that an ordinarily observant person whether a minor or not, would have discovered it within the time deceased was at work on the bank, then such opportunity to know it would be held as knowledge whether, in fact, he knew it or not, and in either case his employer would not be liable."

In *Heath v. Coal Co.*, 65 Iowa, 737, it was declared that the court properly instructed the jury that the plaintiff could not recover for an injury caused by a defect in the track or cars, or for want of appliances

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connected therewith, the condition of which he knew at and before the time of the injury. In *District of Columbia v. McElligott*, 117 U. S. 621, it was said that, if liability might come upon defendant for negligence of its officers controlling the defendant's services, he was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care, if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would be guilty of such contributory negligence as would defeat his claim for injuries received.

And the general rule is that a person cannot be said to take a risk unless he knows, not only the condition of things, but also the danger that exists in such condition. *Coombs v. Cordage Co.*, 102 Mass. 572; *Miller v. Mfg. Co.*, 150 Mass. 362. If, however, the danger is obvious, knowledge of the condition need only be shown. *Sullivan v. Mfg. Co.*, 113 Mass. 296; *Boyle v. Railroad*, 151 Mass. 102; *Foley v. Machine Works*, 149 Mass. 249. In *Anderson v. Clark*, 29 N. E. Rep. 589, it was said in the case at bar: "If any danger existed in the condition of the windlass, or of the appliances, it was an obvious danger to a person of the plaintiff's experience. The exceptions state that he was of full age, had been to sea on vessels of the same kind for many years, and was familiar with this kind of windlass and condition before entering upon the voyage. If there was any failure of duty on the part of the owner this was fully known to plaintiff at the time he made his contract, and it must be assumed that he knew the hazards he was encountering."

Applying these few plain and well-settled principles to the facts of this case, and it becomes at once quite manifest that the demurrer ought to have been

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sustained. While the deceased and his partner were engaged in the work of removing the stubs and columns and thus wrecking the mine, it was their duty to secure defective or unsafe roofs for their own protection. This seems to have been the custom in such cases. The deceased saw the seams indicating a partial displacement of the stone, and tested it by striking it with a pick, the best method occurring to them as experienced miners, and concluded from such test that it would remain where it was until their work was finished. He knew the condition of the stone, and continued to work without complaint and without propping it up himself. Even if defendant knew of the condition of the stone, or might have known it by the exercise of ordinary care and prudence, the uncontroverted evidence is that deceased had the same knowledge. The latter had also the same knowledge of the risk as defendant. The deceased was a man of mature years, and was an experienced miner. He must be presumed to have had the knowledge which common observation forces on the most ordinary intellect to have known the effect and operation of the law of gravitation, and the blasting in the neighboring columns and stubs upon the existing conditions of the superincumbent roof, of which the stone which subsequently fell was a part. He must be presumed to have known that from such causes the stone was likely to break away and fall down, and that the fall must be attended with danger to anyone in its way. *Olson v. McMullen*, 24 Minn. 94; *Walsh v. Railroad*, 27 Minn. 367. Assuming as we must that the danger was as well known to the deceased as to the defendant, the former must be taken to have assumed the risk, and, therefore, he cannot hold the defendant responsible for the direful consequences.

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We do not think the evidence, for the reasons just stated, warranted the court in the submission of the case to the jury. It results that the judgment must be reversed. All concur.

THE STATE OF MISSOURI, Respondent, v. JAMES D. SPARROW, Appellant.

Kansas City Court of Appeals, January 16, 1893.

1. **Indictment:** RULE: STATUTORY OFFENSE. An exception contained in the section of the statute defining an offense and constituting part of its description must be negatived in the indictment.

2. **Criminal Law:** INDICTMENT: HUNTING: EXCEPTION. An indictment under section 3900, Revised Statutes, 1889, for unlawful hunting within the inclosure of John Quinn without the consent of John Quinn, the owner, is bad, as it does not charge that it was also without the consent of the person in charge.

3. ———: ILLEGAL HUNTING: FENCE. An inclosure is sufficient for the purpose and objects of section 3900, *supra*, if the fields of several are under a common inclosure, without a partition fence of any kind, lawful or unlawful.

4. ———: ———: ———. An inclosure is sufficient under said section if it makes it apparent that the owner is holding the land to the exclusion of the public and for his own exclusive use, though the fence have a gap down near the public road.

5. ———: ———: MISDEMEANOR: INDICTMENT. Hunting within the inclosure of another without lawful consent is a misdemeanor and may be prosecuted by indictment or information.

Appeal from the Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED.

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R. S. Matthews and *Dysart & Mitchell*, for appellant.

W. H. Sears, for respondent.

Ellison, J.—The defendant was indicted and convicted for hunting game within the inclosure of another, contrary to the following section of the statutes of 1889: "Every person who shall be found hunting, with gun or dog, within the inclosure of another, or shall enter the same to catch or kill game of any kind, without the consent of the owner or person in charge of such inclosure, shall, on complaint of such owner or person in charge of such inclosure, be fined not exceeding $10." Revised Statutes, 1889, sec. 3900.

The indictment is attacked as being insufficient to support the prosecution. It is in the following words: "The grand jurors for the state of Missouri, summoned from the body of Macon county, impaneled, charged and sworn, upon their oaths, present that James D. Sparrow, late of the county aforesaid, on the twenty-fourth day of November, 1891, at the said county of Macon, state aforesaid, did unlawfully hunt, with a dog and gun, within the inclosure of one John Quinn, and did unlawfully enter the said inclosure to kill game without the consent of the said John Quinn, the owner of said inclosure, against the peace and dignity of the state."

It is a familiar rule of law that, whenever an exception is contained in the section defining an offense, and constitutes part of the description of the offense sought to be charged, the indictment must negative the exception. *State v. Crenshaw*, 41 Mo. App. 24.

The indictment before us does not fill the requisites of this rule. It negatives that the owner of the

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inclosure gave his consent, but, for aught that appears in the pleading, the defendant may have had the consent of the person in charge of the inclosure. It is quite common for some one to be in charge of a farm or inclosure for the owner; such person's consent, under the terms of the statute, would prevent the act of hunting from becoming an offense. So, a tenant might be in the exclusive control, charge and possession of an inclosure as against the owner. In such case the tenant's consent would prevent an offense attaching to the act; and in such case it is more than probable that the owner's consent would not avail the hunter who should go within the inclosure without the tenant's consent. If the indictment had contained an additional allegation that Quinn was in charge of the inclosure, it would have obviated the objection made.

II. Something was said in the record, or at the argument, that this was regarded as a test case upon which other prosecutions depended, and we will, therefore, notice the points presented.

On the trial it appeared that the partition fence between Quinn and one of his neighbors was not a lawful fence and was in very poor condition. This presents no defense to the act charged. The statute on which this prosecution is based does not contemplate that the inclosure shall be made up of a lawful fence. Indeed, it would seem that it would have been a sufficient inclosure, for the purpose and object of this statute, if Quinn and his neighbor's fields had been under a common inclosure, that is, without a partition fence of any kind. Such is not an infrequent occurrence in the agricultural communities of the state.

But in this connection an additional point is made by defendant. It appears that on account of some difficulty another neighbor compelled Quinn to disconnect their fences, thus leaving a gap about four feet

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wide exposed to the public road, which Quinn endeavored to watch. This in our opinion did not have the effect to destroy the inclosure according to the true meaning of the statute. One may hunt on the land of another which is in commons, but, when there is such an inclosure as to make it apparent that the owner is holding the land to the exclusion of the general public and for his own exclusive use, it is sufficient to bring it under the protection of the law.

It is next contended that the section of the statute does not authorize an indictment in cases arising under it, since the act is not declared to be a misdemeanor. This objection is not sound. The offense named in the section is such an act as fills the definition of a misdemeanor in section 3971, and, under section 3971, may be recovered either by indictment or information.

On account of the insufficiency of the indictment the judgment will be reversed, and the defendant discharged. All concur.

LUCINDA LOUDER, Appellant, v. JOHN S. HART, Administrator, Respondent.

52	377
95	62
95	208
98	298

Kansas City Court of Appeals, January 16, 1893.

Parent and Child: CONTRACT: PRESUMPTION. Where a daughter from her birth to her father's death lived with him, and for the sixteen years after her majority there was no apparent change of her relation from child to that of servant working for wages, loose declarations of affection or gratitude with the expressed intention to leave her the farm will not bind the estate for such services, which are presumed to have been gratuitous; and, before recovery can be had therefor, there must be an understanding at the time that one was to pay and the other was to receive pay therefor

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Appeal from the Putnam Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

A. W. Mullins and *F. C. Sickles*, for appellant.

The evidence introduced by plaintiff was amply sufficient to have authorized the submission of the case to the jury for their determination, and, therefore, the court erred in sustaining defendant's demurrer to the evidence. The declarations made by plaintiff's father to various witnesses and on many occasions, during the time she was rendering the services charged for, amounted to admissions as to the value and importance of her labor and services, and the manner in which it was bestowed, and were competent evidence to go to the jury in connection with all the circumstances in the case. And from all the evidence and circumstances it was a question for the jury to determine whether the services were rendered under a contract, express or implied, for wages or not. *Koch v. Hebel*, 32 Mo. App. 103; *Hart v. Hart's Adm'r*, 41 Mo. 441; *Smith v. Myers*, 19 Mo. 433; *Wood v. Land*, 35 Mo. App. 381; *Reando v. Misplay*, 90 Mo. 251; *Smith v. Smith, Adm'r*, decided by this court and not yet reported.

Huston & Parish and *Franklin & Franklin*, for respondent.

(1) "The claim of a child for services rendered to his father after majority while a member of his family are not regarded favorably by the courts." *Walker's Estate*, 3 Rawle (Pa.) 243; *Swires v. Parsons*, 5 U. S. (Pa.) 357. "Causes of this sort are among the most odious that courts have to deal with." *Lynn v. Lynn*, 29 Pa. St. 369; *Sprague v. Nickerson*,

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1 U. C. Rep. 284; Wood on Master & Servant [1 Ed.] pp. 117, 118. "Claims against estates of this sort are a very dangerous class of cases, and should be scrutinized carefully by the courts." *Wood v. Land*, 30 Mo. App. 181. (2) In the absence of a contract to pay, express or implied, there can be no recovery. There is no contention that there is any evidence of any express contract. There is no contract implied from the fact that the services were rendered. The relation of the parties raises the presumption the other way. *Bash v. Bash*, 9 Pa. St. 260; *Hall v. Finch*, 29 Wis. 278; *Wood v. Land*, 30 Mo. App. 181; Wood on Master & Servant [1 Ed.] sec. 72, p. 115; *Duffey v. Duffey*, 44 Pa. St. 399; *Hartman's Appeal*, 3 Grant's Cases (Pa.) 234; *Hall v. Hall*, 44 N. H. 293. (3) In this class of cases it is a well-settled rule of law that it is not enough to prove a moral obligation, but either an express contract or such facts that from that the law will imply a contract must be shown. *Bash v. Bash*, 9 Pa. St. 260; *Sprague v. Nickerson*, 1 U. C. 284; *Hall v. Finch*, 29 Wis. 278; *Duffey v. Duffey*, 44 Pa. St. 399; *Wood v. Land*, 30 Mo. App. 181; Wood on Master & Servant, sec. 72, p. 115. (4) There is not a scintilla of proof that the claimant expected pay while rendering the service charged for. There must be a mutual understanding that the services are to be paid for. *Leidig v. Coover's Ex'rs*, 47 Pa. St. 534; *Green v. Roberts*, 47 Barb. (N. Y.) 521; *Wood v. Land*, 30 Mo. App. 181; *Davis v. Goodno*, —— Vt. 715; *Hudson v. Lutts*, 5 Jones' Law (N. C.) 217; *Hall v. Finch*, 29 Wis. 278; *Hertzogg v. Hertzogg*, 29 Pa. St. 465; *Kaye v. Crawford*, 22 Wis. 322; *Wood v. Land*, 30 Mo. App. 181.

GILL, J.—This is an action for services, brought by the plaintiff against her father's estate. The circuit

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court sustained a demurrer to plaintiff's evidence, and she appealed.

I. After a careful consideration of the entire testimony brought forward by the plaintiff at the trial, we indorse and approve the court's action in declaring that plaintiff ought not to recover.

The law applicable to this class of cases has been so often repeated, that it is scarcely necessary here to again refer to it. This plaintiff, from her birth to the death of her father, continuously lived with her father and mother on the little eighty-acre farm. She seems to have been dutiful, industrious and kind to her aged parents. The three—father, mother and daughter—lived at and were supported in common from the products of the little farm. And during the sixteen years of plaintiff's majority (the time for which she charges for her services), there was no different relation than that existing during her minority; nor does there appear anything *tending* even to show that she had changed from the faithful minor daughter into the capacity of a servant, working for wages. The most that can be said is, that the plaintiff did her duty nobly towards her parents; that she labored faithfully and assisted her father in caring for the little farm; and that he was appreciative and grateful because she did not desert them and at different times expressed an intention to leave the eighty acres, on which they jointly resided and by which they were jointly supported, to Lucinda, "when he was through with it!"

It was now because of such service, and these expressions of good will and kind intentions from the parent, that the plaintiff sought to establish a contract between herself and her father. It may have been, and perhaps was, the moral duty of the deceased father to have left his little farm and all he had to this faithful daughter, rather than it should have been

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divided among others of the children who had not stood by him with equal fidelity. However, it is not the province of the courts in this manner to substitute their will for that of the dead man, or even to make a will to accord with what it may be thought he intended

Loose declarations made to neighbors or friends indicating mere affection or gratitude are not enough to bind the estate. The services must have been performed under a *contract*, express or implied, under such circumstances as it may be reasonably inferred that an understanding existed at the time between the deceased and the child, that the one was to pay and the other to receive pay for the services performed. The law presumes such services to be gratuitous; and there rests a burden on the claimant (in a case like this) to prove that they were not so intended when they were rendered.

The law of the case will be found in the authorities cited in briefs of counsel. Judgment affirmed. All concur.

RICHARD JONES, Respondent, v. THE CHICAGO, BURLINGTON & KANSAS CITY RAILWAY COMPANY, Appellant.

52	381
58	465
59	140
52	381
66	624

Kansas City Court of Appeals, January 16, 1893.

1. **Railroads:** KILLING STOCK: CATTLE-GUARD: J. P.: ALLEGATION. A complaint before a justice of the peace for killing stock by reason of an insufficient cattle-guard should allege, *first,* there was a certain crossing over defendant's railway in a certain township; *second,* that adjacent thereto defendant had failed to erect and maintain proper cattle-guards, etc.; *third,* that by reason thereof plaintiff's mare passed from the crossing to the track, etc.

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2. ——: ——: ADJOINING TOWNSHIP. Where an action before a justice of the peace for killing stock is brought in the township adjoining the one where the killing occurred, it should be so alleged in the complaint and shown by the evidence.

Appeal from the **Putnam** *Circuit Court*.—HON. ANDREW ELLISON, Judge.

REVERSED AND REMANDED.

Palmer Trimble, *J. H. Carroll* and *H. D. Marshall*, for appellants.

(1) There was no evidence introduced tending to prove the averments of this petition that "Union township, in which the suit is brought adjoins Lincoln township in which said mare was killed." Hence the justice is not shown to have had jurisdiction, and the circuit court acquired none. Revised Statutes, 1889, sec. 6126; *Wright v. Railroad*, 25 Mo. App. 230; *Kinion v. Railroad*, 30 Mo. App. 573; *Michell v. Railroad*, 82 Mo. 106; *Jewett v. Railroad*, 38 Mo. App. 50; *Whitesides v. Railroad*, 49 Mo. App. 250; *Gilly v. Railroad*, 38 Mo. App. 579; *King v. Railroad*, 90 Mo. 520; *Backenstoe v. Railroad*, 23 Mo. App. 148; *Backenstoe v. Railroad*, 86 Mo. 492; *Hansberger v. Railroad*, 43 Mo. 196; *Wiseman v. Railroad*, 30 Mo. App. 517; *Palmer v. Railroad*, 21 Mo. App. 437. (2) Appellant objected to the introduction of any evidence as to the cattle-guards "near by," and demurred to all the evidence offered or introduced by plaintiff, on the ground that the complaint did not state a cause of action as to the cattle-guards "near by" The court overruled the objections and demurrer. This was error. *Vaughn v. Railroad*, 17 Mo. App. 14; *Morrow v. Railroad*, 82 Mo. 171; *Cecil v. Railroad*, 47 Mo. 249; *Davis v. Railroad*, 65 Mo. 44; *Johnson v. Railroad*, 76 Mo. 553; *Nance v. Railroad*, 79 Mo. 196; *Manz v. Railroad*, 87 Mo. 278.

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A. D. Christy and *A. W. Mullins*, for respondent.

Smith, P. J.—This suit was brought before a justice of the peace under the provisions of Revised Statutes, 1889, section 2611, to recover double damages for the killing of plaintiff's mare. The complaint alleged amongst other things "that defendant failed to erect and maintain a good and sufficient cattle-guard near by to prevent stock from going onto said railroad at or near said place where said animal was struck and killed." There was no further allegation therein relating to the cattle-guard. There was also the further allegation that "Union township in which the suit was brought adjoins Lincoln township in which said animal was struck and killed." There was a trial resulting in judgment for plaintiff from which defendant appealed.

The defendant challenges the judgment on the ground that the trial court erred in refusing to tell the jury by an instruction asked by it that upon the complaint and evidence the plaintiff was not entitled to recover. This instruction should have been given. The allegation which we have heretofore quoted from the complaint was insufficient. The section of the statute upon which the complaint was based requires that every railroad in this state "shall construct and maintain cattle-guards where fences are required sufficient to prevent horses, cattle, mules and other animals from getting on the railroad."

In order to render a complaint good under this statutory provision it should allege, *first*, that there was a certain crossing over defendant's railway at a certain point in a certain township; *second*, that adjacent to such crossing the defendant had failed to erect and maintain a proper cattle-guard sufficient to prevent horses, cattle, mules and other animals from getting upon defendant's track; and, *third*, that by reason of

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such insufficient cattle-guard plaintiff's mare passed from said crossing upon defendant's track, and was there struck and killed by its locomotive and cars. *Vaughn v. Railroad*, 17 Mo. App. 4; *Morrow v. Railroad*, 82 Mo. 169; *Nance v. Railroad*, 79 Mo. 196; *Cecil v. Railroad*, 47 Mo. 249; *Johnson v. Railroad*, 76 Mo. 553; *Manz v. Railroad*, 87 Mo. 278. The complaint is defective in these essentials, and was insufficient, and the instruction in the nature of a demurrer, as it was, should have been given.

The defendant further contends that said instruction should have been given for the additional reason that it was alleged in the complaint, but not proven, that Union township in which the suit was brought adjoined that of Lincoln in which the plaintiff's mare was struck and killed. Under the provisions of section 6126, Revised Statutes, this was indispensably necessary to confer jurisdiction. It has been repeatedly decided by the appellate courts of this state that, in suits under the statute for killing stock in a township other than that in which the suit is brought, the fact that the two townships adjoin each other is jurisdictional, and must be not only alleged but must be proved at the trial. *Wisconsin v. Railroad*, 30 Mo. App. 517; *Kinion v. Railroad*, 30 Mo. App. 574; *Palmer v. Railroad*, 21 Mo. App. 437; *Jewett v. Railroad*, 38 Mo. App. 50; *Whitesides v. Railroad*, 49 Mo. App. 250. This last contention of defendant must also be upheld. It may be that the plaintiff can prove that Lincoln township adjoins that of Union and that the omission to prove that fact at the trial, if such it be, happened through inadvertency, and, therefore, we shall reverse the judgment and remand the cause with leave to the plaintiff to amend his complaint, if he so elects, so as to make it conform to the suggestions in this opinion made. It is so ordered. All concur.

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52 93	385 *242
52 94	385 *524
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JOHN A. TOLMAN COMPANY, Respondent, v. J. R. MEANS *et al.*, Appellants.

Kansas City Court of Appeals, January 16, 1893.

1. **Guaranty:** KNOWLEDGE OF ACCEPTANCE. Where a contract is made engaging a traveling salesman at one time in one state, and, some days thereafter in another state, he secures the signatures of defendants to the guaranty provided for in the contract of employment, which he forwards to plaintiff, *held*, the two contracts are not contemporaneous. And it is suggested that defendants are entitled to notice of their acceptance as guarantors.

2. ——: ——. Where the guarantor knows, as a matter of fact, he is accepted as such, he is bound. Knowledge is the material matter; no form or special channel of notice is needed.

Appeal from the Putnam Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

Marshall & Franklin Bros., for appellants.

(1) The court erred in refusing to sustain defendants' objection to the introduction of testimony on plaintiff's petition. *Bank v. Shine*, 48 Mo. 456, and cases cited; *Childs v. Rankin*, 9 Mo. 673. It is not sufficient to make a case to show that there was at the time the guaranty was signed a contract between the plaintiff and Slade; but it must be shown that the said contract was before the guarantors. *Childs v. Rankin*, *supra*. The court erred in giving the first instruction, asked by plaintiff, and in refusing the fifth, sixth, seventh, eighth, ninth and tenth asked by the defendants. *Railroad v. Smith*, 27 Mo. App. 371.

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A. W. Mullins, for respondent.

If there be a mere proposal to guarantee a contingent liability, then notice to the guarantor must be given of its acceptance. But the law is settled, certainly in this state, that, where a party directly binds himself to be responsible for the fulfillment of another's contract already made, no such notice is required. And such is the present case. *Machine Co. v. Jones*, 61 Mo. 409; *Barker v. Scudder*, 56 Mo. 272.

ELLISON, J.—This action is based on a contract of guaranty, which contract arose under the following circumstances:

One Slade was employed as a traveling salesman for plaintiffs who were a wholesale firm doing business in the city of Chicago. His employment being evidenced by the following writing, viz.:

"This memorandum certifies: Engaged James N. Slade as salesman to solicit orders for goods for us (John A. Tolman Company), he expending his entire time and energy in faithfully and intelligently rendering such service for one year from date (or at our option as to time). We are to pay him forty per cent. of the profits he makes on the route selling goods for us, he to pay his own expenses and to furnish his own sample case. We to be the final judge of all credit given customers, and no order is to be counted as a sale except order acceptable to us. On the further condition that he stays the full year's time out, and also stands fifty per cent. of any loss that may be incurred from bad debts, or any expense for collecting difficult accounts on the territory for the time when the sales for the year are collected; we are then to pay an additional ten per cent. of the profits, and until that time this ten per cent. of the profits is to be held as a guaranty fund for the purposes specified. And at the end of the

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year, when collections for the sales are made, if losses from bad debts have occurred, we are to deduct one half of the amount of the same from this ten per cent. guaranty fund and to pay over the balance, but, if half the amount of the losses exceed the amount of the guaranty fund, we are to stand the balance."

It was understood between plaintiffs and Slade that he was to obtain parties to guarantee the performance of his contract, though no particular persons were mentioned. Slade went to Unionville in the state of Missouri, and, several days after executing the foregoing contract of employment, procured the defendants to sign the following instrument which he mailed to plaintiffs at Chicago, viz.:

"In consideration of the sum of $1 to me in hand paid by John A. Tolman Company, the receipt of which is hereby acknowledged, I or either of us hereby guarantee the payment to John A. Tolman Company, of any and all moneys collected by James N. Slade for account of John A. Tolman Company, and for all moneys which they may from time to time advance to said James N. Slade, and any and all indebtedness now due or which may hereafter become due John A. Tolman Company in excess of the amount due James N. Slade as per agreement between said John A. Tolman Company and said James N. Slade, and to accept a verified statement of the accounts as kept in the regular books of said John A. Tolman Company as correct and final between the said company and the said James N. Slade, and without requiring any demand or notice of default. My liability, however, is limited hereby to one thousand dollars ($1,000) together with interest at eight per cent. per annum until paid, and all costs, attorneys' fees and expenses that shall arise from enforcing collections, and for such amounts this is intended as a continuing guarantee."

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Plaintiff obtained judgment below.

The contention here is that there should have been notice given to defendants of the acceptance of their contract of guaranty. And in support of this contention we are cited to the cases of *Childs v. Rankin*, 9 Mo. 673, and *Savings Bank v. Shine*, 48 Mo. 456, to which we add *Taylor v. Shouse*, 73 Mo. 361. Plaintiffs, on the other hand, contend that defendants' contract is one where they agree to be directly liable, and that it is not a mere overture or proposition to guarantee a contingent liability of another party, and, hence, no notice of acceptance is necessary, citing *Barker v. Scudder*, 56 Mo. 272, and *Machine Co. v. Jones*, 61 Mo. 409. There is perhaps no question where more diverse and contradictory opinions have been pronounced. The legal propositions formulated and stated are substantially uniform, but the application of the facts in the different cases to these principles is confusihg in the extreme.

It will be noted that the principal contract here was entered into in Chicago, Illinois; and that the obligations, duties and debts of Slade were mainly contingent on future action; and that the guaranty by these defendants was executed in Missouri several days afterwards and forwarded to plaintiffs at Chicago. The original contract and the guaranty were not contemporaneous. Nothing appears in this part of the transaction to show that plaintiffs *accepted* of defendants as guarantors. They may have rejected them because of their distance and inconvenience from Chicago, or, perhaps, may not have thought them desirable guarantors. Though Slade continued in the service of plaintiffs, yet, for aught defendants knew (as appears from this portion of the case) he may, on plaintiff rejecting these defendants, have gotten others. Plaintiff surely had the privilege of rejecting or accepting defendants as guarantors, and surely, unless accepted, no liability

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attached. Certainly it is no uncommon thing for proffered surety to be rejected. These remarks which we believe to be supported by the cases of *Mosby v. Tinkler*, 1 C. M. & R. 692; *Beckham v. Hale*, 17 John. 134, 139; *Mussey v. Rayner*, 22 Pick. 223; *Kay v. Allen*, 9 Pa. St. 320; *Craft v. Isham*, 13 Conn. 33; *Allen v. Pike*, 3 Cush. 238; *Milroy v. Quinn*, 69 Ind. 406, we prefer not to be interpreted as a decision of the question, or as binding upon us as a precedent, for the reason that there remains a ground in the record sufficiently clear and comprehensive to dispose of the case.

That ground is, that, while plaintiffs did not give defendants notice that they accepted them as guarantors, yet defendants had knowledge that they were so accepted. Two of them addressed a letter to plaintiffs expressly showing that they considered themselves guarantors for Slade, and the face of the case fairly shows that all of them so understood it. This is sufficient. Knowledge of being accepted as guarantors is the material matter. It is not necessary to inquire how the knowledge is acquired. No form of notice is necessary, and no specific channel of information need be sought. 1 Brandt on Suretyship & Guaranty, sec. 204. It follows that the judgment should be affirmed. All concur.

THE STATE OF MISSOURI, Appellant, v. JAMES BASKETT, Respondent.

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52 389 / 63 246
52 389 / 73 604
52 389 / 76 589
52 389 / f81 206
52 389 / 158s 73
52 389 / 87 473

Kansas City Court of Appeals, January 16, 1893.

1. **Criminal Law:** INFORMATION: DRUGGIST SELLING LIQUOR. An information against a defendant for illegal sale of intoxicating liquor which charges him with "being then and there a dealer in drugs and medicines" is insufficient under chapter 58, Revised Statutes, 1889, which is leveled against druggists, proprietors of drug stores and pharmacists.

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2. **Definitions:** DRUGGIST. A druggist, according to chapter 58, Revised Statutes, 1889, is one who is registered as such.

3. **Criminal Law:** INFORMATION: FOLLOWING STATUTE. An offense should be charged, substantially at least, as set out in the act defining it. An information, charging a druggist with selling intoxicating liquors in quantities less than one gallon, is bad, under chapter 58, Revised Statutes, 1889, which places the *minimum* at four gallons.

Appeal from the Putnam Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

J. C. McKinley, Prosecuting Attorney of Putnam County, and *A. W. Mullins*, for the State.

(1) The information is sufficient. It states an offense under the druggist law. 1 Revised Statutes, 1889, ch. 58, p. 1054; 1 Revised Statutes, 1889, sec. 4621, p. 1056; Kelley's Criminal Law & Practice [2 Ed.] p. 743. The information is sufficient also to charge an offense against the defendant under the dramshop law. 1 Revised Statutes, 1889, ch. 56, p. 1044; 1 Revised Statutes, 1889, ch. 56, sec. 4570, p. 1044; Kelley's Criminal Law & Practice [2 Ed.] p. 749. It is also sufficient under the merchants' license law. 2 Revised Statutes, 1889, ch. 111, p. 1617; 2 Revised Statutes, 1889, sec. 6915, p. 1620; 2 Revised Statutes, 1889, sec. 6919, p. 1621; *State v. Searcy*, 46 Mo. App. 432–3. (2) In order to make the information sufficient it is not necessary that the exact words of the statute should be followed, provided words of equivalent import be used, and the defendant apprised of the nature of the offense charged, and his substantial rights not prejudiced by omissions or surplusage. The court erred in sustaining the motion to quash the information. It does not matter what statute the pleader had in view, the infor-

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mation is good, if an offense is charged against the provisions of any existing statute. *State v. Barr*, 30 Mo. App. 498; *State v. Dengolensky*, 82 Mo. 44; Wharton's Criminal Pleading & Practice [8 Ed.] ch. 3, sec. 226; *State v. Meyers*, 99 Mo. 114.

Marshall, Franklin & Franklin, for respondents.

(1) As claimed by the state, it is not a privilege of a citizen to sell intoxicating liquor. And to this might be added that it is not a privilege of the state to put a citizen on trial charged with a criminal offense without first filing a proper indictment or information. (2) Section 4621 applies to only those specifically enumerated in sections 4617–21, chapter 58, pages 1055–56, Revised Statutes, 1889, and they only can by any possibility violate the drug law by selling intoxicating liquors. The pleader in this case makes the mistake of following sections 5472–75, chapter 99, page 1075, Revised Statutes, 1879, instead of using the language contained in sections 4617–21 above referred to. The entire law on which such construction is based has been repealed. *State v. Greene*, 27 Mo. App. 626; 2 Revised Statutes, 1889, ch. 58, pp. 1054–1057. A person may be a dealer in drugs and medicines, and at the same time not be a druggist as defined by law. *State v. Martin*, 5 Mo. 361; *State v. Hunter*, 5 Mo. 360; *Martin v. State*, 9 Mo. 286; *State v. Heckler*, 81 Mo. 417; *State v. Ryan*, 30 Mo. App. 159; *State v. Lysle*, 58 Mo. 358; *State v. Helm*, 6 Mo. 263. (3) Where a prosecution is bottomed on a statute, and the words of the statute are descriptive of the offense and enter into its definition, there is no law better settled than that the exact words of the statute must be used; the law in such cases allows no substitute, because no other words are

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exactly descriptive of the offense. *State v. Ross*, 25 Mo. 429; *State v. Emrich*, 87 Mo. 115; *State v. Decus*, — 410; *State v. Cox*, 29 Mo. 475; *State v. Ryan, supra; State v. Greenhagen*, 36 Mo. App. 24; *State v. Cornell*, 45 Mo. App. 94.

GILL, J.—Defendant was prosecuted before a justice of the peace for selling intoxicating liquors contrary to the druggists' law, chapter 58, Revised Statutes, 1889. He was tried in the justice's court, found guilty, fined $100, and appealed to the circuit court. In that court defendant moved to quash the information on the grounds: "*First.* Because the said information does not charge any offense under the laws of this state. *Second.* Because the said information does not follow the language of the statute creating the offense with which the defendant is intended to be charged. *Third.* Because the said information does not charge that the defendant is a druggist, an owner of a drug store or a pharmacist." The court sustained this motion, and the state appealed.

Section 4617 of the law relating to druggists and their licenses (chapter 58, Revised Statutes, 1889) provides that intoxicating liquors shall only be sold by druggists as prescribed by section 4621 (of the same chapter). Said section reads: "No *druggist, proprietor of a drug store or pharmacist* shall, directly or indirectly, sell, give away or otherwise dispose of alcohol, or intoxicating liquors of any kind, in any quantity less than *four* gallons," etc. The information in this case reads: "one James Baskett, being then and there *a dealer in drugs and medicines*, did on, etc., at, etc., sell D. W. Reed intoxicating liquor in less quantities than *one* gallon, to-wit, one pint of wine," etc.

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A *druggist*, subject to prosecution under the foregoing act, is one who is registered as such, and, when so designated in section 4621, that particular class is intended. *State v. Greene*, 27 Mo. App. 627. But here the defendant is sought to be charged under the act as "a dealer in drugs and medicines." One might be a dealer in drugs and yet not a *registered druggist*, as is the class sought to be regulated by the law contained in chapter 58, *supra*. The reason is thus stated in the *Greene case, supra:* "He is indicted as being of a special calling and violating the law as such. The law which makes the offense and declares the punishment defines who may be the offender." It is only then this particular class thus defined that can be brought to answer under this particular law. It was then clearly demanded of the state, when seeking to hold defendant as a violator of the druggist law, to charge defendant with being a druggist, as well as to prove the allegation at the trial.

More than this, the offense must be charged—substantially, at least—as set out in the act. It is not required that the exact words should be used, but there must be words used of equivalent import and meaning. *State v. Barr*, 30 Mo. App. 501; *State v. Effinger*, 44 Mo. App. 83. Now, the offense defined in the statute is, the selling "intoxicating liquors of any kind in any quantity less than *four* gallons," etc. But defendant is charged in this information of selling "intoxicating liquors in less quantities than *one* gallon," etc. This of itself was fatal to the information. Nor is it aided by the *videlicet* statement of *one pint*, etc. *State v. Greenhagen*, 36 Mo. App. 24; *State v. Fanning*, 38 Mo. 409.

It would seem that the prosecuting attorney inadvertently drew his information under the law as it existed prior to the act of 1881—that is, under chapter 99,

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Revised Statutes, 1879. But this law was repealed, and the law now in force restricting and controlling druggists in the sale of intoxicating liquor is found only in chapter 58, Revised Statutes, 1889. And it was, moreover (as we have already held), the design of this law to cover the entire ground in relation to sales of liquor by druggists without reference to other statutes. The defendant, then, is amenable to that statute, and it alone. *State v. Piper*, 41 Mo. App. 160; Kelley's Criminal Law & Practice [2 Ed.] p. 744.

The circuit court committed no error in quashing the information, and the judgment is affirmed. All concur.

GEORGE DEUSER, Appellant, v. OLIVER HAMILTON, Respondent.

Kansas City Court of Appeals, January 16, 1893.

1. **Evidence:** PAROL TO VARY WRITTEN CONTRACT. Defendant, who introduced a written agreement proving that a certain note should be applied toward the payment of a certain judgment, cannot be permitted to vary the same by showing by parol that said note was to be applied to the liquidation of the matter in dispute, there being no plea of modification of the contract, or any pretense of fraud or mistake.

2. ———: ATTORNEY AND CLIENT: PRIVILEGED COMMUNICATIONS. Defendant and his attorney were present at a settlement with plaintiff's firm, and the attorney made certain *memoranda* of the settlement showing the application of certain notes and credits. *Held*, such *memoranda* were not privileged but were admissible in evidence on the part of plaintiff, following *Deuser v. Walkup*, 43 Mo. App. 625.

Appeal from the Atchison Circuit Court.—HON. C. A. ANTHONY, Judge.

AFFIRMED.

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Thos. H. Parish and *Lewis & Ramsay*, for appellant.

(1) The court erred in allowing defendant, after introducing the written contract of February 21, 1889, to offer to prove a different contract, as to the $454 paid by Deuser upon the Farmers' Bank judgment, there is no charge that these items were so applied through any oversight, error or mistake, but the attempt is to set up and prove a different contract from that stated in the writing. 1 Greenleaf on Evidence [Redfield's Ed.] sec. 275; *Van Ostrand v. Reed*, 1 Wend. 424; *Rodney v. Wilson*, 67 Mo. 123; *Jones v. Shaw*, 67 Mo. 667; *Helmrichs v. Gehrke*, 56 Mo. 79. Such other alleged contract, if it existed, would be without consideration. *McGlothin v. Hemry*, 59 Mo. 213; *Willis v. Gammill*, 67 Mo. 730. (2) The court erred in excluding inquiry into calculations and memoranda made at the settlement of August 6, 1889, by John P. Lewis, attorney for defendant, for purpose of showing that $360 Hall note and interest were credited to defendant in that settlement. They were not privileged communications as held by the court below. They were made by Lewis, defendant's attorney, in making the settlement in the presence of all parties interested. It was the act of all parties and in no sense privileged. 1 Thompson on Trials, sec. 296, and numerous authorities cited; 2 Greenleaf on Evidence [10 Ed.] secs. 244, 245; *Deuser v. Walkup*, 43 Mo. App. 625.

No brief for respondent.

Gill, J.—Plaintiff Deuser sued defendant Hamilton on account of moneys paid upon four notes wherein Hamilton was maker and Deuser his surety. The

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answer, with some obscurity and much verbosity, practically confesses the execution of the notes, and that plaintiff had paid the same, but defends mainly on the ground that he, the defendant, had made the plaintiff whole by payment, etc. Defendant's third and fourth counts may be more properly called counterclaims. In view of what we have to say, we deem it unnecessary to set out the pleadings or evidence in detail. The jury found in plaintiff's favor on the first count of the petition in a sum much less than the amount claimed; for the defendant as to the second, third and fourth counts of the petition; and for defendant in a small sum on one of his counterclaims; and, from a judgment thereon, plaintiff has appealed.

Whilst counsel for plaintiff have urged many objections, we readily discover in this record two substantial reasons for reversal. During the progress of the trial the defendant introduced as part of his testimony an agreement or contract in writing made and signed by these litigants, and others, wherein it was stipulated (among other things) that plaintiff was to and did receive of certain moneys arising out of a trustee's sale of defendant's land the sum of $454, and which the writing declared was to repay plaintiff an amount which he had been compelled to pay for defendant on what was known and designated as the Farmers' Bank judgment. Following this written evidence, which defendant himself had produced, he proceeded to testify that such $454 was not left with plaintiff for the purpose named in the agreement, but that, at the time such instrument was executed, he and plaintiff had an oral understanding whereby it was agreed that said $454 was to go towards the liquidation of the matters here sued on. To this testimony plaintiff objected, and, on an adverse ruling by the trial judge, saved his exceptions.

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In this ruling the trial court was in error. It was a plain case of permitting the party to vary or contradict a written contract by parol evidence of a different agreement had contemporaneously with the execution of the writing. This cannot be done. There was no pretense that the insertion of this matter in the writing was accomplished by fraud or mistake. And, if defendant intended to show a subsequent modification of the original written contract, he ought to have pleaded the same, and made proper proof thereof.

The court also committed error in excluding certain written *memoranda* made by attorney Lewis relating to a settlement had between the firm of Deuser Bros. and defendant in August, 1889. It is necessary, for an understanding of the point, to state the circumstances. The fact stands admitted that, while the plaintiff rested under an obligation to pay a $400 note made by defendant to one Snyder (and for the payment of which plaintiff bases the first count of the petition), the defendant turned over to plaintiff, or to Deuser Bros., a note for $360, which defendant held against Hall. The defendant claimed at the trial that this Hall note was given over to plaintiff, George Deuser, with an understanding that it should be collected, and the amount applied on the Snyder note. But plaintiff insisted that such Hall note was transferred by defendant to *Deuser Bros.*, to be collected by them and applied on a store account which defendant owed at the time.

Now to sustain plaintiff's contention, when defendant was on the witness stand, plaintiff's counsel on cross-examination had the witness to identify a *memorandum* of figures made by defendant's attorney, Lewis, whilst he, the defendant and the Deuser Bros., were together adjusting and settling their mutual accounts. The *memorandum* was objected to and excluded by the

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court, because made by defendant's attorney and privileged. It is said that this *memorandum* would show that the Hall note went into the settlement of accounts had between defendant and Deuser Bros., and that in such settlement defendant had credit for said Hall note. This then was quite important evidence for the plaintiff.

We have had this exact question before us, and it would seem too in relation to the same paper. See *Deuser v. Walkup*, 43 Mo. App. 625. We held there, that, as the *memorandum* was made in the presence of all concerned and was not, therefore, private, it was not a professional confidential communication between attorney and client, and, therefore, not privileged. We adhere to the decision in that case; and to avoid unnecessary repetition refer to that opinion for our reasons.

Judgment reversed and cause remanded. All concur.

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KANSAS CITY, Respondent, v. JOHN SUTTON, Appellant.

Kansas City Court of Appeals, January 16, 1893.

1. **Municipal Corporations**: PARTIALITY OF ORDINANCE: PRESUMPTION. The courts will pronounce invalid and inoperative an ordinance found palpably unreasonable, partial and not general, but unjustly discriminating; but partiality, unfairness or oppression must be clear, as the presumption is quite strong in favor of the validity of municipal legislation.

2. ———: ORDINANCE NOT VOID. Police regulations are not to be condemned because not specifically aimed at all persons in whatever business engaged, as they may have an express design of reaching certain classes in certain characters of work. An ordinance fixing the *maximum* load of a two-horse team and wagon, and prescribing a penalty against the contractor employing such team for exceeding such *maximum*, is not void on the ground of partiality.

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Appeal from the Jackson Criminal Court.—Hon. Henry P. White, Judge.

Affirmed.

Beebe & Watson, for appellant.

Said ordinance is void. (1) Because it is class legislation. It singles out contractors and corporations who employ any teamster using two-horse wagons, hauling certain material, either by the load or by the day. This renders it void. Dillon on Municipal Corporations, sec. 322; *Chicago v. Rumpff*, 45 Ill. 90. (2) Said ordinance is unreasonable. (3) Said ordinance interferes with the rights of a party to contract.

James W. Fraher, for respondent.

(1) Said ordinance is not void. Because it is not partial in its terms or effects. It is directed against a whole particular class of persons, to-wit: "Persons, corporations and contractors employing teamsters." It operates equally on all the class who engage in the "business" of employing teamsters. There can be classification for the purpose of police regulation. *Ex parte Seibenhauer*, 14 Nev. 365; *Amader Co. v. Kenneday*, 11 Pac. Rep. 757; Horr & Bemis on Municipal Police Ordinances, sec. 135, p. 104. (2) Said ordinance is not unreasonable. An ordinance, to be void for unreasonableness, must be plainly and clearly unreasonable. *White v. Kent*, 11 Oh. St. 550; *Neier v. Railroad*, 12 Mo. App. 25; *Sargent v. Railroad*, 1 Handy (Ohio) 52; *St. Louis v. Weber*, 44 Mo. 447. (3) Said ordinance does not interfere with the rights of parties to a contract only so far as is "incidentally unavoidable." *Wetumpka v. Wharf Co.*, 63 Ala. 611; *Cook v. Johnston*, 58 Mich. 437; *Horn v.*

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People, 26 Mich. 222; Horr & Bemis on Municipal Police Ordinances, sec. 6, p. 5.

Gill, J.—Appeal from the criminal court of Jackson county.

The defendant, a brick contractor, was convicted in the lower court of the violation of an ordinance to prevent the overloading of teams, etc., in that he required a team and teamster employed by him to haul more than nine hundred brick at one load, and the defendant brings the case here by appeal.

I. The validity of the city ordinance is the only question. No point is made as to the right in the city to pass an ordinance of this general nature; but it is contended that this particular ordinance should be declared void as being unreasonable, unfair and partial.

The portion of the ordinance necessary to be here repeated reads as follows: "Be it ordained by the common council of Kansas City: "Sec. 1. No person, corporation or contractor who shall employ any teamster using a two-horse wagon to haul any material within the limits of this city, either by the load or by the day *shall require any such teamster* to haul any dirt, rock, macadam or any other material in loads to exceed the dimensions or weight fixed as hereinafter set forth, viz." Then follow the specifications in detail of what shall constitute a two-horse wagonload of different materials, naming nine hundred brick as the limit under the ordinance. It is admitted now that defendant required a team and teamster by him employed to haul one thousand brick contrary to the terms of this ordinance.

The power, undoubtedly, rests with the courts to review the legislation of municipal bodies; and, where it is found palpably unreasonable, partial and not general, but made up of unwarranted, unfriendly and

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unjust discrimination as against certain persons, they do not hesitate to pronounce it void and altogether inoperative. 1 Dillon on Municipal Corporations [4 Ed.] sec. 322. It is well, however, to bear in mind that a very clear case of partiality, unfairness or oppression should appear before the courts will interfere with the discretion of the municipal body. The presumption is quite strong in favor of the validity of its legislation. *City of St. Louis v. Weber*, 44 Mo. 547; *City of St. Louis v. Spiegel*, 8 Mo. App. 482; *Chillicothe v. Brown*, 38 Mo. App. 609.

This ordinance is attacked because, it is said, it is directed only as against those engaged in a certain character of business while it fails to reach others in different employments. For example, it is urged, the person, corporation or contractor, hiring two-horse teams to haul certain material (such as rock, brick, sand and lumber), is made the subject of this police regulation, while others, such as the wholesale dealers, are not amenable to its provisions. The ordinance is, therefore, claimed to be partial, unfair and not general in its operation.

We do not think this position of the learned counsel can be maintained. Police regulations, such as this, are not to be condemned because not specifically aimed at all persons, in whatever business engaged. Ordinances of this kind may be passed with an express design of reaching certain classes of people who may be engaged in certain characters of work. As is often the case the evil to be corrected only exists in certain quarters. For example, laws or ordinances are passed, and their legality unquestioned, to regulate the saloons, the merchants in handling their goods, the butcher as to when and where his meat shall be slaughtered and sold, the omnibus or hotel runner as to where and when

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they may solicit patronage, the express man as to where he shall stand his conveyance, etc. In these and like cases, the legislative body may deem it important and conducive to the public good to throw around such employment certain restrictions; and, so long as every individual so engaged is, in the matter of legislation, treated the same as those in his own class and no law is passed directed against him alone, then the regulation or restriction cannot be charged with being partial, and for that reason void. This manner of legislating in regard to a class is of frequent occurrence and entirely proper. *St. Louis v. Weber*, 44 Mo. 547; *Chillicothe v. Brown*, 38 Mo. App. 609, and cases cited; *City of Kansas v. Cook*, 38 Mo. App. 660; Tiedeman on Limitation of Police Powers, ch. 9. It is only necessary that the "classification be well defined and based on some reasonable distinction. If the members of each class are then treated alike the ordinance is unobjectionable." Horr & Bemis on Municipal Police Ordinances, sec. 135.

The ordinance here under consideration has for its apparent object the protection of the dumb brute, to prevent cruelty to animals, a worthy subject of legislation, and so considered by all enlightened people. It was doubtless a matter of observation to the lawmakers of Kansas City, that this class of persons (such as was the defendant) were habitually causing the maltreatment of the teams of poor dependent haulers, and toward the correction of this evil and the punishment of the real offenders this ordinance was leveled.

The judgment will be affirmed. All concur.

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LEO FELIX, Respondent, v. W. S. BEVINGTON, Appellant.

Kansas City Court of Appeals, January 16, 1893.

1. **Contracts:** BREACH: MONEY HAD AND RECEIVED. Defendant sold plaintiff a half interest in his saloon for $500, $200 down, which was paid, $200 to be paid the next day and the other $100 in thirty days. The second $200 was never paid. On the eighth day defendant told plaintiff he would run the saloon himself, whereupon the plaintiff demanded the $200 paid which was refused, and he sued for money had and received. *Held*, he had committed a breach of his contract, that his sickness and attendance in court as shown in the evidence furnished no excuse for the breach, and he was in no condition to defeat the contract by rescission.

2. **Practice, Trial:** DEMURRER. Where at the close of plaintiff's case defendant presents a demurrer, and on its refusal introduces testimony in his own behalf, he takes the risk of aiding plaintiff's case, waives his demurrer and cannot afterwards be heard to complain of its refusal. If his own testimony does not come to plaintiff's relief, he can again demur to the whole evidence, but, if the trial be before the court, he need not demur again, and his failure to do so does not admit plaintiff has a standing on the facts.

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

REVERSED.

Teasdale, Ingraham & Cowherd, for appellant.

(1) The buyer, having broken the contract by failing to pay as agreed, has no legal standing in a suit against the seller, because he was himself first in the wrong. Bishop on Contracts, sec. 835; Parsons on Contracts, 812, 813; Bishop on Contracts [Enlarged Ed.] secs. 489, 834, 1349, 1418, 1434, 1440; *Dobbins v. Edmonds*, 18 Mo. App. 316. (2) Respondent tried his case at every turn on the theory that he had rescinded

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the contract because of the wrongful acts of appellant. Even if he should be permitted to now change front and assert that his actions were based on appellant's rescission; that is, for the effect of the rescission. (3) As to putting in testimony after demurrer overruled see *Eswin v. Railroad*, 96 Mo. 290; *McPherson v. Railroad*, 97 Mo. 253.

O. T. Knox and *J. S. Brooks*, for respondent.

(1) There is no demurrer to the evidence to be considered by this court in this case, because not reduced to writing and because appellant did not stand upon it; but subsequently introduced testimony in defense and submitted his case to the court for judgment. *Cadmus v. Bridge & Tunnel Co.*, 15 Mo. App. 86; *McCarty v. Railroad*, 15 Mo. App. 385; *Googer v. Finn*, 10 Mo. App. 226; *Bolt & Iron Co. v. Buell*, 8 Mo. App. 594. (2) If the demurrer to the evidence is considered in this court, then it admits the truthfulness of respondent's witnesses, and the truth of their testimony, and the only issue before this court is, whether such testimony entitled plaintiff to recover, and appellant's testimony cannot be considered by this court. *Pinnell v. Stringer*, 59 Ind. 555; *Nordyke & Co. v. Van Sant*, 99 Ind. 188; *Woodgate v. Threlkeld*, 3 Bibb, 597; *Harris v. Railroad*, 89 Mo. 233; *Buesching v. Gaslight Co.*, 73 Mo. 219; *Frick v. Railroad*, 75 Mo. 595; 2 Thompson on Trials, sec. 2267, p. 1621. (3) If there is no demurrer to the evidence to be considered by this court, then appellant has no standing here, as no declarations of law or instructions were asked by either plaintiff or defendant or given or refused by the court at the trial of the cause. *Claflin & Thayer v. Burkhart*, 43 Mo. App. 226; *Miller v. Breneke*, 83 Mo. 164; *Lee v. Porter*, 18 Mo. App. 377.

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(4) If this court considers appellant's demurrer to the evidence, and includes therein appellant's testimony, it is still of no consequence; because, if it contradicts respondent's testimony, it is waived by the admission of the truth of that evidence. *Hart v. Callaway*, 2 Bibb, 460; *Cunningham v. Snow*, 82 Mo. 587; *DeLaureal v. Kemper*, 9 Mo. App. 77; *Ford v. Cameron*, 19 Mo. App. 467; *Weilandy v. Lemuel*, 47 Mo. 322. (5) *First.* The appellant unlawfully rescinded his contract with respondent, and respondent could sue to recover money paid if he so desired. *Second.* The same rule applies if respondent should have rescinded on account of the unlawful acts of appellant. Bishop on Contracts [Enlarged Ed.] secs. 831, 834; *Fine v. Rogers*, 15 Mo. 315; *Parker v. Marquis*, 64 Mo. 38; *Warren v. Tyler*, 81 Ill. 15; *Bayliss v. Pricture*, 24 Wis. 651; *Brown v. Mahurin*, 39 N. H. 156; *Corl v. Railroad*, 17 Q. B. 127; *Kerr v. Bell*, 44 Mo. 120; *Jarrett v. Morton*, 44 Mo. 275; *Smith v. Busly*, 15 Mo. 387; *Woodward v. Van Hoy*, 45 Mo. 300.

Ellison, J.—This action was begun before a justice of the peace for money had and received. On appeal to the circuit court plaintiff recovered on trial without instructions.

For the purpose of a proper disposition of the cause it may be stated in a few words as gathered from the testimony of plaintiff himself. Defendant sold to plaintiff one-half interest in his saloon in Kansas City, as well as the lease on the building, for $500. Of this sum $200 was paid at the time, and $200 was to be paid in two days, and a note for $100 executed, due in thirty days. The $200 cash was paid. The remaining $200 was not paid at the time stated, nor has it been since, nor has it been tendered. The excuse given for not paying is that plaintiff took sick a day after the sale and remained

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sick several days; that the first day he recovered he was subpœnaed as a witness in court at Kansas City; that when court adjourned on that day he went to defendant at five o'clock in the evening to tell him that he had been detained in court. Other portions of his testimony show that he was about plaintiff's place before this, and told him that he could pay nothing that day as he was sick. The sale was made on Monday, the twenty-fourth of February, and plaintiff states in one portion of his testimony that he was at the place on Tuesday and Wednesday, and at another place he states that it was Monday of the following week when he was in attendance on the court. On that Monday still not having paid or tendered to defendant the money due, he says that defendant told him he would run the saloon himself, and that he thereupon demanded of defendant the $200 he paid at the beginning, which defendant refused, and he thereafter instituted this action before a magistrate.

Allowing to plaintiff's testimony all that can be allowed or reasonably inferred, and it is still hard to make out just how he put in the eight days from the sale till his demand for the return of his money. It is clear that he was not sick during all of the period after he was to have paid the remaining $200, nor was he in court. But, granting that he was either sick or in court, how can that excuse him in a court of law for a breach of his contract? If sickness or the mere matter of being subpœnaed in court would justify the breach of contracts, business would be too precarious for safety. Our opinion is, that plaintiff shows himself without legal excuse for his breach, and that he is, therefore, in default so far as concerns the present action; being in default he is not in the position to defeat the contract by rescission. Bishop on Contracts, secs. 1349, 1418, 1434, 1437.

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We will say further, since much stress is put upon the matter in respondent's brief, and since we must disallow his contention, that when defendant demurred to the evidence at the close of the plaintiff's case, and thereafter, on its being refused, introduced testimony in his own behalf, he took the risk of aiding plaintiff's case by such testimony, and practically waived the demurrer, and he cannot afterwards be heard to complain of the refusal. But if his testimony does not come to plaintiff's relief he may if he chooses again demur at the close of the whole evidence. But the cause at bar being before the court without a jury, he need not necessarily again demur. If he does not he will not be held to admit that plaintiff has a standing on the facts. He is entitled to a proper finding on the whole evidence as presented.

The judgment is reversed. All concur.

THE JOHNSON–BRINKMAN COMMISSION COMPANY, Appellant, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

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126m 348

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s72 439
s72 446

52 407
151m 585

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95 1 44
e95 1 45

Kansas City Court of Appeals, January 16, 1893.

1. **Remedies:** EFFECT OF ELECTION: SUIT. If plaintiff has an election between inconsistent remedies, as where one action is founded on an affirmance and the other upon a disaffirmance of a voidable sale or contract, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all; and the institution of a suit is such decisive act.

2. ———: ———: ATTACHMENT: REPLEVIN. Plaintiff sold to Johnson three carloads of wheat to be paid for on delivery, and delivered the same by transferring the bills of lading therefor, and, thereupon, Johnson drew his check in plaintiff's favor for the purchase price, which check was dishonored the same day; and plaintiff on the same day sued Johnson in attachment, garnishing the defendant as his bailee

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and attaching in his hands the said wheat, the ground of attachment being that the wheat was not paid for on delivery as contracted. Eight days afterwards, plaintiff dismissed its attachment suit, and brought this action of replevin for the same wheat. *Held,* the attachment suit was an affirmance of the sale, and was inconsistent with the replevin proceeding which was a disaffirmance thereof; and plaintiff's choice to sue in attachment precludes him from pursuing the remedy by replevin.

3. **Sales:** RESCISSION: PROMPT ACTION: SILENCE. If a vendor has been defrauded in the sale of his goods and subsequently comes to the knowledge of such facts as would authorize a rescission, he must act at once, or his silence will be construed as a ratification.

4. **Remedies:** ELECTION FINAL: INJURY: JUDGMENT. An election between inconsistent remedies will be final, and cannot be reconsidered even where no injury has been done by the choice, or would result from setting it aside; nor is it necessary to pursue the chosen remedy to a judgment to make the election final.

5. **Evidence:** ELECTION OF REMEDIES. *Held,* in this case, that plaintiff cannot save itself from the consequences of the election by proving that the attachment suit was hastily brought without deliberate consultation with its attorneys, and with a misconception of its rights and remedies.

6. **Sales:** CASH PAYMENT: REMEDIES. If goods are sold for cash on delivery, then upon default of payment the seller had a clear right to either of the two remedies, to-wit, to affirm the sale and sue in attachment for the purchase money or revoke the sale and sue in replevin for the recovery of the specific articles sold.

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

TRANSFERRED TO SUPREME COURT.

THIS is an action of replevin for three carloads of wheat. The Missouri Pacific Railroad Company is only a nominal party, the interested defendant being Albers & Co., of St. Louis. In order to give an understanding of the case, it seems necessary to make the following statement of facts: On the morning of September 1, 1890, the plaintiff commission company contracted with the Imboden Commission Company at

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Kansas City, to sell to it the three cars of wheat, and which were to be paid for on delivery. The delivery was made by means of the transfer of the bills of lading which plaintiff commission company held; and when such possession was thus delivered the Imboden Company gave to plaintiff its check on the Central Bank of Kansas City for the amount of the purchase. This check however was not paid when presented, and the plaintiff forthwith (on said September 1) instituted an action against the Imboden Company for goods sold and delivered; and in aid thereof sued out a writ of attachment, the grounds thereof, as alleged in the affidavit, being "that the debtor had failed to pay the price or value of the article delivered, which by contract it was bound to pay on delivery." When this attachment was sued out the cars of wheat in controversy were still in the defendant's freight yards at Kansas City, and the sheriff under the directions of the plaintiff levied on the wheat by garnishing the railroad company. This all occurred on the first day of September, 1890.

On the ninth day of September plaintiff dismissed its attachment suit against the Imboden Company, and at once brought this action of replevin, wherein it claimed to be the owner and entitled to the possession of the same three cars of wheat which it had formerly caused to be levied on as the property of the Imboden Company.

In order to account for the alleged interest of Albers & Co., it is proper to say, that when the Imboden Company got possession of the wheat it was billed to Albers & Co., at St. Louis; and along with the bill of lading the Imboden Company drew its draft on said consignees for the amount they were to pay for the wheat, and the said draft was passed through the banks and collected of Albers & Co. at their office in St. Louis. It is contended however by the plaintiff (and

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for the purposes of this case we will concede it) that before Albers & Co. paid the Imboden draft they were informed of plaintiff's claim, and were not, therefore, innocent purchasers.

On the trial below, the jury was peremptorily instructed to find for the defendant; and from a verdict and judgment in accordance therewith plaintiff has appealed.

Lathrop, Morrow & Fox, for appellant.

(1) The court erred in ruling, as a matter of law, that the mere act of bringing an attachment suit was a conclusive election between inconsistent remedies and was a complete bar to this action. There can scarcely be any question about this proposition unless this court shall feel in duty bound to overturn the rule established by the St. Louis Court of Appeals in the cases of *Milling Co. v. Walsh*, 20 Mo. App. 107, and *Lapp v. Ryan*. 23 Mo. App. 436; *Foundry Co. v. Hersee*, 33 Hun, 169, 176; *Butler v. Hildreth*, 5 Met. 49. (2) It seems to us too plain for argument, that, before the plaintiff can be put to his election, he must have an opportunity to acquire knowledge of the facts, upon which the availability of the remedy depends. To require a vendor to say he will affirm sale and rely upon the personal responsibility of the vendee, or that he will rescind the sale and take back the goods, without a knowledge on his part as to whether the goods are still in the possession of the vendee, or transferred to an innocent person, is a proposition, the statement of which is its own refutation. *Mining Co. v. Mining Co.*, 7 Fed. Rep. 401, 424. The rule is thus stated in *Bunch v. Grave*, 12 N. E. Rep. 517; Bigelow on Estoppel [2 Ed.] 503; *Nanson v. Jacob*, 93 Mo. 331. (3) The defendant at the trial relied upon the authority of *Bach v.*

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Tuch, 26 N. E. Rep. 1019. That was a case where the contract for the sale of goods was tainted with fraud. The plaintiff, with full knowledge of the fraud, brought his attachment suit and then dismissed it and brought replevin; the court held he could not recover in the latter action, the former action being a conclusive election of remedies. The principle of that case is easily distinguished from the one at bar. (4) We quote the syllabus of a long case, as follows: "The acts of a party, bound to elect between two inconsistent rights, in order to constitute election, must imply a knowledge of the rights and an intention to elect." *Dillon v. Parker*, 1 Swanston's Chancery Reports, pp. 369, 378, *et seq.*; *Spread v. Morgan*, 11 H. of L. Cases, 588, 602; *Bank v. Beale*, 34 N. Y. 473; *Kennedy v. Thorp*, 51 N. Y. 176; *Rodermund v. Clark*, 46 N. Y. 354; *Nanson v. Jacob*, 93 Mo. 331, 346.

Elijah Robinson and *Jos. S. Laurie*, for respondent.

(1) Plaintiff had the option to ratify or rescind the sale in question; and, having elected to ratify, plaintiff is precluded from maintaining a subsequent action based upon a rescission of such sale. The correctness of the foregoing as an abstract proposition will not, we take it, be disputed. Benjamin on Sales [6 Ed.] secs. 33, 442. Neither can it be denied that "the election to rescind or not to rescind, once made, is final and conclusive." *Pence v. Langdon*, 99 U. S. 578, 582; *Crossman v. Rubber Co.*, 127 N. Y. 34. But the dispute in the case at bar is as to what constitutes such election. Instead of pursuing the discussion of the questions involved in this proposition in our own language, we will cite and quote the following leading cases upon the subject: *Crook v. Bank*, 52 N. W. Rep. (Wis.) 1131; *O'Donald v. Constant*, 82 Ind. 212;

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Connihan v. Thompson, 111 Mass. 270; *Sanger v. Wood*, 3 Johns. Ch. 416, 421; *Butler v. Hildreth*, 5 Mich. 49; *Terry v. Munger*, 121 N. Y. 161; *Lehman, Durr & Co. v. Van Winkle & Co.*, 92 Ala.; *Conrow v. Little*, 115 N. Y. 387, 393; *Bach v. Tuch*, 126 N. Y. 54; *Crossman v. Rubber Co.*, 127 N. Y. 34; *Thompson v. Fuller*, 16 N. Y. S. 486; *Fowler v. Bank*, 113 N. Y. 450; *Foundry Co. v. Hersee*, 103 N. Y. 25; *Acer v. Hotchkiss*, 97 N. Y. 395; *Moller v. Luska*, 87 N. Y. 166; *Morris v. Rexford*, 18 N. Y. 552; *Nield v. Burton*, 49 Mich. 53; *Thompson v. Howard*, 31 Mich. 304; *Arnold v. Hagerman*, 45 N. J. Eq. 186; *Carter v. Smith*, 23 Wis. 497; *Wheeler v. Dunn*, 13 Col. 428; *McLean v. Clapp*, 141 U. S. 429; 1 Am. St. Rep. 625–9; 10 Am. St. Rep. 479–94; 15 L. R. A. 89; Bigelow on Estoppel [5 Ed.] pp. 673–679; Herman on Estoppel, secs. 1039, 1043–5, 1051–2; *Taylor v. Short*, 107 Mo. 384; *Nanson v. Jacob*, 93 Mo. 331, 345. (2) It is proper, in concluding our discussion of this branch of the case, to refer to *Milling Co. v. Walsh*, 20 Mo. App. 107, and *Lapp v. Ryan*, 23 Mo. App. 436, two decisions by Judge THOMPSON of the St. Louis Court of Appeals, cited by appellant. Counsel insist that said decisions announce the rule that an attachment suit by the injured vendor to recover the purchase price does not constitute an election of remedies so as to bar replevin for the same property, provided the attachment is dismissed prior to bringing replevin. We do not agree with counsel in their construction of said decisions, but we have not space or time to analyze the same at present and will take occasion to do so upon the oral argument of this cause. Suffice it to say here, that, conceding counsel's version of said cases to be correct, yet they are directly contrary to the great weight of authority in the courts of last resort of other jurisdictions, and, besides, are practically overruled by subsequent decisions of the supreme court of

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this state, cited *supra*. Such was the view adopted on the trial of this cause by his honor, Judge HENRY, after careful consideration. (3) The verdict is for the right party, and the judgment should, therefore, be affirmed. "Where upon the whole record the judgment is manifestly for the right party, it will not be reversed, though some errors may have intervened." *Phillips v. Bachelder*, 47 Mo. App. 52.

GILL, J.—I. From the foregoing statement it will be seen that, on September 1, 1890, the plaintiff sold this wheat to the Imboden Company, and that the purchaser failed to pay therefor on delivery as was agreed; that, thereupon, plaintiff sued the Imboden Company for the purchase price and attached the same and other property. Eight days thereafter (that is, September 9) the plaintiff dismissed the attachment suit, and brought this action in replevin for the recovery of the same goods.

Under these circumstances the circuit court held that the institution of the attachment suit on September 1, and levy on the wheat by plaintiff's direction, amounted to an irrevocable election to confirm the sale to the Imboden Company, and, therefore, precluded a subsequent resort to this action to reclaim the same. That ruling, whether correct or not, is the matter for our determination.

The decision of the trial court was, as we think, clearly within the law, and its judgment will be affirmed. We find in a case from Massachusetts the law thus fairly and correctly stated: "The defense of waiver by election arises when the remedies are inconsistent; as when one action is founded on an affirmance, and the other upon a disaffirmance of a voidable contract or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with knowledge of the facts,

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determines the legal rights of the parties, once for all. The institution of a suit is such decisive act; and, if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon." *Connihan v. Thompson*, 111 Mass. 272. This doctrine is fully sustained by the decided cases and text-writers. Consult the following, among others: *Crossman v. Rubber Co.*, 127 N. Y. 37; *Bach v. Tuch*, 126 N. Y. 56, *et seq.; Terry v. Munger*, 121 N. Y. 164, *et seq.; Conrow v. Little*, 115 N. Y. 393; *Moller v. Tuska*, 87 N. Y. 166; *Morris v. Rexford*, 18 N. Y. 552–557; *O'Donald v. Constant*, 82 Ind. 212; *Butler v. Hildreth*, 5 Met. (Mass.) 49; *Lehman v. Van Winkle*, 92 Ala. 443; *Thompson v. Howard*, 31 Mich. 309; *Carter v. Smith*, 23 Wis. 499; *McLean v. Clapp*, 141 U. S. 432; *Nanson v. Jacob*, 93 Mo. 331; *Taylor v. Short*, 107 Mo. 384; Bigelow on Estoppel [5 Ed.] ch. 21; 2 Herman on Estoppel, sec. 1045; Benjamin on Sales, sec. 442.

The evidence here unquestionably shows that on the afternoon of September 1 the plaintiff knew all the material facts which gave it the right to rescind the sale to Imboden and reclaim the wheat; for in its attachment affidavit it sets out the very ground that gave it the right to declare the contract off and retake the property. Imboden had agreed to pay for the wheat on delivery, but had failed to do so, and plaintiff, of course, knew it. The plaintiff also knew that the wheat was then equally in the reach of attachment or replevin. And it is quite, too, as certain that the plaintiff then had knowledge of the insolvency of the Imboden Company. The knowledge of this one fact (to-wit, that Imboden had not paid for the wheat on delivery as was agreed) opened to the

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plaintiff alternative rights or remedies, that is, to affirm the sale and sue in attachment for the purchase price, or disaffirm the sale and replevin the wheat. These were clearly inconsistent rights or remedies, not concurrent. In the attachment suit for the price of the goods, the plaintiff, in the most formal manner, declared the wheat to be the property of Imboden, and thereby affirmed the contract, but, by the prosecution of the subsequent replevin, the contract of sale was repudiated. Plaintiff had the option to pursue the one or the other course—to affirm or disaffirm—but not the right to pursue *both* remedies. He cannot be allowed to *approbate* and *reprobate* at the same time. Having made a choice (with full knowledge of all the facts), the law will compel the plaintiff to abide by it.

It is well settled that if the vendor has been defrauded in the sale of his goods, and subsequently comes to the knowledge of such facts as would authorize a rescission, he must act at once on the discovery of the facts. His *silence* even will be construed a ratification or affirmance. How much more, then, should it be regarded as a ratification if the vendor, with a knowledge of the facts, sue for the contract price and levy an attachment on the identical goods sold. "This," says Judge Shaw, in *Butler v. Hildreth*, *supra*, "is a significant act, an unequivocal assertion that he does not impeach the sale, but, by necessary implication, affirms it." "Where a party takes legal steps to enforce a contract, this is a conclusive election not to rescind on account of anything then known to him." *Conrow v. Little*, *supra*.

But it seems contended that plaintiff should not be barred of this action, since it is not shown that anyone was harmed by the subsequent repudiation of a former election. But, as said by Judge Peckham, in *Terry v. Munger*, *supra:* "When it becomes necessary

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to choose between inconsistent rights and remedies, the election will be final, and cannot be reconsidered, even where no injury has been done by the choice, or would result from setting it aside." To same effect see also 2 Herman on Estoppel, sec. 1045. The rule we are seeking here to enforce is not, correctly speaking, grounded upon equitable estoppel. It is upon the principle that the plaintiff, by its own free act and choice, decided to sell the property, and, having done so, it necessarily follows that it has no right to replevin the same. Nor is it necessary that the former action should have been prosecuted to judgment before a conclusive election can be claimed. *Terry v. Munger, supra.*

At the trial below the plaintiff sought to save itself from the consequences of its election of remedies thus adopted by an attempt to prove that the attachment suit was hastily brought, and without deliberate consultation with its attorneys; that its manager, who directed the bringing of the attachment, did not understand his legal rights, and that he misconceived his remedy, etc. The court properly declined any such excuse. In addition to the application of the maxim, *Ignorantia legis neminem excusat*, the facts are such that plaintiff ought not to be heard to make such a claim. Johnson (the plaintiff company's manager) went on September 1 to his lawyer's office, complaining that the Imboden Company had the possession of wheat which it had bought and agreed to pay for on delivery, but had not done so, and ordered attachment papers prepared. All the facts necessary to a complete understanding of the case were then before the attorney and his client, and they, deliberately, though in some haste, brought the suit. And, more than this, eight days were permitted to run before any change in the remedy was sought; and during this eight days (to-wit,

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on September 4 and September 8) plaintiff gave orders to and did release certain other goods from the attachment levy, showing that during the eight days, and until the ninth, it was in the mind of the plaintiff to prosecute the action by attachment for the purchase money. But both actions, it would seem, were equally available, if not equally effective. As said by defendant's counsel, if the wheat was sold for cash on delivery, then, upon default of payment the seller had a clear right to either of the two remedies, to-wit: To affirm the sale and sue in attachment for the purchase money, or revoke the sale and sue in replevin for the recovery of the specific article sold.

We hold, then, with the trial court, that the plaintiff, in the case at bar, had the option to ratify or rescind the sale in question, and, having elected to ratify, with knowledge of the material facts, plaintiff is precluded from maintaining this subsequent action of replevin, which was based on a rescission of the sale. It was the institution of the attachment suit which settled for all time the character of the transaction, and it was wholly immaterial whether that suit was prosecuted to judgment or dismissed beforehand; the legal effect was the same.

We understand ourselves to be in accord with an overwhelming weight of authority, as shown by the numerous cases heretofore cited, but in conflict with the St. Louis Court of Appeals in *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107, and *Lapp v. Ryan*, 23 Mo. App. 436.

Complying then with the mandate of the constitution, we order the transfer of this cause to the supreme court. All concur.

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THE MIDLAND LUMBER COMPANY, Respondent, v. ROBERT R. KREEGER *et al.*, Appellants.

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78	88
52	418
86	680
52	418
98	1425

Kansas City Court of Appeals, January 16, 1893.

1. **Principal and Agent:** CORPORATION'S BOOKKEEPER'S REPRESENTATIONS: ESTOPPEL. A corporation's bookkeeper's representation as to the state of account between the corporation and one of its customers is competent to bind that corporation, but his representation as to the risk of paying such customer, a contractor, the amount due on his contract for building defendant's house, as he was prompt and reliable, and that the bookkeeper would notify the defendant if the contractor did not pay his account, etc., do not bind the corporation, unless shown to have been made by its authority, and cannot constitute the basis of an estoppel, even if the defendant acted on the same.

2. **Mechanics' Lien:** EXCESS IN ACCOUNT. A lien account was for $900, due for lumber in a building; in fact there was only $500 worth of lumber used. The excess was in separable items, and it did not appear that anyone was defrauded or injured thereby. *Held*, such excess did not defeat the lien, as the lienor did not knowingly and intentionally file an untrue and unjust account.

Appeal from the Jackson Circuit Court.—HON. MATHEW A. FYKE, Special Judge.

AFFIRMED.

Gates & Wallace, for appellants.

(1) The defendant went to the plaintiff's place of business for the purpose of ascertaining whether the lumber furnished for his house was being paid for. He went to the proper agent of the company to ascertain this fact, the agent in charge of the books of accounts. That agent gave him false information concerning the books, and thus led him to believe that the lumber was

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being paid for. Relying upon this, the defendant paid the contractor. Upon this state of facts, as found by the referee, it would be unjust to permit the plaintiff to claim a lien upon the defendant's property. *Clinton v. Lindsay*, 38 Mo. App. 57; *Rand v. Grubb*, 26 Mo. App. 591; *Isenman v. Fugate*, 36 Mo. App. 166; *Lumber Co. v. Stone*, 19 Neb. 402; *Raley v. Williams*, 73 Mo. 310; *Newman v. Mueller*, 16 Neb. 523; *Alexander v. Ellison*, 79 Ky. 148; *Fielding v. Du Bois*, 63 Tex. 631; *Youngstown v. Moore*, 30 Ohio St. 133. (2) The account filed was not a just and true account as required by the statute. The account which was sworn to, and which contained several hundred items, amounted to $960.18, while the amount of lumber furnished for and used in the defendant's house, as found by the referee, was only $516.20. A lien statement so greatly in excess of the actual amount due is not a just and true account. *Kling v. Construction Co.*, 7 Mo. App. 410; *Uthoff v. Gerhard*, 42 Mo. App. 256; *Gauss v. Hussman*, 22 Mo. App. 115; *Hoffman v. Walton*, 36 Mo. 613; *Nelson v. Withrow*, 14 Mo. App. 277; *Reitz v. Ghio*, 47 Mo. App. 287; *Schulenberg v. Robinson*, 5 Mo. App. 561; *Rand v. Grubb*, 26 Mo. App. 591; *Murphy v. Murphy*, 22 Mo. App. 18.

J. B. Hamner, for respondent.

(1) Corporations to be estopped must be so by some act or deed of some one authorized (not by every idle promise or assertion of its employes), and then the opposite party must have relied and acted thereon. *Eitelgeorge v. Building Ass'n*, 69 Mo. 52; *Spurlock v. Sproule*, 72 Mo. 503; *Acton v. Dooley*, 74 Mo. 63; *Rogers v. Marsh*, 73 Mo. 64; *Noble v. Blount*, 77 Mo. 235. (2) As to plaintiff's account being "the just and true account" required by statute, respondent

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cites a list of cases where lienors intentionally omitted just credits, or knowingly charged for what was either not sold or not lienable, and largely incumbered the real estate in excess of what lienors knew to be just and right. Here there was ample evidence that the lumber was sold to Green, some evidence that it went into the building, but the evidence believed by referee was for a less quantity. To defeat a lien on this ground there must be an intentional omission, or commission, with intent to defraud. *Gerard B. Allen & Co. v. Mining & Smelting Co.*, 73 Mo. 688; *Heltzel v. Railroad*, 20 Mo. App. 435; *Henry v. Mahone*, 23 Mo. App. 83; *Johnson v. Building Co.*, 23 Mo. App. 546; *Schroeder v. Mueller*, 33 Mo. App. 28.

Smith, P. J.—This is an action by the plaintiff corporation to enforce a mechanics' lien for materials furnished by it to a contractor who used the same in a house built by him for the defendant. The case went to a referee who made a finding of facts and a report thereon of his conclusions of law. Judgment on the report was for plaintiff and from which defendant appeals.

Two questions are raised by defendant's exceptions to the report of the referee which we must decide. The first of these is, whether the plaintiff is estopped from claiming a lien by the acts and conduct of its bookkeeper as found by the referee.

The report of the referee shows that he found, "that defendant Kreeger, prior to the time when he settled with the contractor, defendant Green, and paid him off, went to the office of the plaintiff and asked for the bookkeeper; that he was referred to a man who was acting as bookkeeper at the time; that he asked the bookkeeper if the defendant Green was buying his lumber from the plaintiff; that the bookkeeper

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replied that he had an account there, and that he was paying on it right along; *that Kreeger asked how the account on his house stood; that the bookkeeper replied that he could not tell;* that Kreeger then asked him if he considered Green as responsible, to which the bookkeeper replied that he had been dealing with them for some time and had sold him considerable lumber, and he had always been prompt in paying, and that they considered him as perfectly reliable, and that Kreeger would run no risk in paying him; that Kreeger then told the bookkeeper that his house would be done in eight or ten days and asked the bookkeeper to notify him if at that time his account for his house was not paid, and this the bookkeeper promised to do; that Kreeger, after the house was finished, waited about five weeks and then paid Green off in full, without having heard anything from the bookkeeper or plaintiff."

The rule has been long and firmly established, that where one by his words or conduct wilfully causes another to believe in a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. *Union Savings Ass'n v. Kehlor*, 7 Mo. App. 158; *Taylor v. Zepp*, 14 Mo. 482; *Bates v. Perry*, 51 Mo. 449; *Spurlock v. Sproule*, 72 Mo. 503; *Acton v. Dooley*, 74 Mo. 63; *Newman v. Mueller*, 16 Neb. 523; *Davis v. Handy* 37 N. H. 65; *Pickard v. Sears*, 33 Eng. Co. Law, 257.

But the question here presented is, did the referee find a state of facts bringing the case within the foregoing rule? Did the plaintiff make the statements which it is claimed influenced the defendant's action to his injury? The referee found that the statements were made by a person who was acting as bookkeeper at the time. It does not appear that the defendant applied to

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the president, or other officer, or to the plaintiff's general business manager for the information elicited from the bookkeeper, and that he was referred to the bookkeeper for such information. Nor does it appear directly or inferentially that the bookkeeper possessed any authority to make all the statements to defendant which he did.

The rule which admits the admissions of an agent as against his principal is limited to two cases: *First*, when the scope of the agency is such that the agent is an agent for the purpose of making the particular admission, and, *second*, where the admission is in the form of a declaration made by an agent while acting within the scope of his agency and about the business of his principal concerning such business. *Bevis v. Railroad*, 26 Mo. App. 19; *McDermott v. Railroad*, 73 Mo. 516; *Adams v. Railroad*, 74 Mo. 553; *Aldridge v. Furnace Co.*, 78 Mo. 559. And in Bigelow on Estoppel, 598, it is stated that a principal is not estopped to deny the authority of an agent having limited powers by any representations of the agent, if the principal has not authorized the agent.

In Mechem on Agency, section 714, it is stated that not every statement, representation or admission which the agent may choose to make is binding upon the principal. In order to have that effect they must have been made, in respect to a matter within the scope of his authority. The term "authority" thus used has the same significance which it has in reference to the agent's act or contract. If, therefore, the statements, representations or admissions offered in evidence were made by one who either had no authority at all or had no authority to represent the principal in the matters concerning which they are made, they are not admissible against the principal. So they must have been made with reference to the subject-

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matter of his agency. And the same author further states, in section 716 of his work, that there must first be a *prima facie* showing of the agent's authority by other evidence before his admissions, declarations or representations can be admitted, if otherwise competent.

According to these rules it is plain enough that the representations of plaintiff's bookkeeper as to the state of the account of Green with plaintiff would be competent to bind the plaintiff, but as to this matter he gave no information to defendant whatever. But the other statements made by him had no reference to his books or their contents, and about which alone he was competent to speak with binding authority.

It not having been found that the statements made by plaintiff's bookkeeper to the effect that defendant would run no risk in paying Green the amount due the latter on his contract, or that Green was prompt and reliable, or that he would notify the defendant if Green did not pay his account when his house was finished, were made by authority of the plaintiff, the same cannot be held to constitute the basis of an estoppel, even if the defendant acted on the same. This could be no more so than if an indorser on a note to a bank who held a security as an indemnity were to go to the bank and inquire of its bookkeeper whether the maker had paid off his note, and the latter had told him that he was not able to tell him that, but the maker was very responsible and prompt in his transactions with the bank, and that he did not think the indorser would run any risk if he released his security, and that he would inform him if the note was not paid. Now would anyone contend that in such case the bank would be estopped to have recourse against the indorser if the maker failed to pay the note, notwithstanding the indorser relied and acted upon the statements made by the bookkeeper? This case is not different in principle

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from the one at bar.* We are unable to discover in the facts found by the referee a single element upon which to found an *estoppel in pais*.

The second ground of defendant's appeal is, since the amount of lumber charged in the lien statement is in excess of that found by the referee to have been used in the building, whether the effect of that will defeat the plaintiff's lien. The amount charged in the lien statement is $960.18, while that found by the referee is $516.20. The statute, section 6743, it is true requires the lienor to file "a just and true account of the amount due," but, if, as in this case, his account contains separable lienable items which are not proved, must he lose his lien for those that are proven? We do not think this would be so, unless it appeared that some one had been defrauded or injured thereby. *Schulenberg v. Strimple*, 33 Mo. App. 154; *Johnson v. Building Co.*, 23 Mo. App. 549; *Pullis v. Hoffman*, 28 Mo. App. 671; *Allen v. Mining Co.*, 73 Mo. 688.

This case is not analogous in its facts to that of *Uthoff v. Gerhard*, 42 Mo. App. 256, and similar cases cited by defendant where the lienor knowingly and intentionally filed an untrue and unjust account. The report of the referee discloses nothing of that kind.

We discover no error in the rulings of the trial court, and so affirm the judgment. All concur.

A. C. WURMSER, Appellant, v. L. P. SIVEY, Respondent.

Kansas City Court of Appeals, January 16, 1893.

1. **Sales: RETAINING TITLE: EFFECT OF STATUTE. Sections 5180 and 5181, Revised Statutes, 1889, were intended to make a radical change in the law relating to personal property, and to prevent secret transactions from injuring creditors and purchasers of apparent owners.**

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2. **Chattel Mortgage:** STATUTE. Where there was an absolute sale, and the vendor of chattels receives part of the purchase price and takes a chattel mortgage to secure the unpaid balance, sections 5180, and 5181 Revised Statutes, 1889, have no application to the transaction, and upon default the mortgagee can replevin the goods without tendering back the sum paid on the purchase price.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

REVERSED AND REMANDED.

Ess, Block & Georgen, for appellant.

The court erred in peremptorily instructing the jury to find for defendant. Sections 5080 and 5081; Revised Statutes of 1889, do not apply to sales upon the installment plan where a chattel mortgage or deed of trust is given by the purchaser to secure the unpaid purchase price. *Daily v. Mfg. Co.*, 88 Mo. 301, 305; s. c., 14 Mo. App. 597. In both courts this precise question was directly decided in accordance with what we contend is the law.

C. O. Tichenor, for appellant.

It will not be contended that a conditional sale of a chattel and a mortgage upon it are the same, for the mortgagor has the title while the conditional vendee not only does not, but may never have it. *Sumner v. Cottey*, 71 Mo. 125. Statutes requiring that these bills of sale be recorded are of recent date, and effect a radical change in the old law. *Coover v. Johnson*, 86 Mo. 539; *Peet v. Spencer*, 90 Mo. 387; *Wooley v. Watson*, 22 Mo. App. 552; *Eidson v. Hedger*, 38 Mo. App. 55; *Angier v. Paper Co.*, 1 Gray, 621; *Colcord v. McDonald*, 128 Mass. 470. Hence it is that courts, where there is doubt, construe an act a mortgage instead of a conditional sale. The evils

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which called for the statute, and which it was designed to remedy, arose from these conditional bills of sale and not from mortgages; and it is proper to consider this in construing a statute. *Spitler v. Young*, 63 Mo. 44; *Smith v. Laumeier*, 12 Mo. App. 549, affirmed 84 Mo. 672; *State ex rel. v. Diveling*, 66 Mo. 379. (2) The construction of a statute should be reasonable. Endlich on Statutes, sec. 264.

H. Winston, for respondent.

(1) Inasmuch as none of the purchase money was paid, and none of the goods delivered till after the execution and delivery of the instrument, which appellant claims to be a mortgage, and as that instrument, if valid, transferred and assigned to appellant the interest of respondent in goods, and is still valid and in force, if it ever was, therefore, there was never any real absolute sale of the property to respondent; there was merely a contract for a sale of it to him, no title to the property ever passed absolutely to the respondent, and the transaction as a whole, was in effect a mere conditional sale to become absolute only "if said note and every installment therein mentioned shall be well and truly paid according to the tenor and effect thereof when the same becomes due and payable." The transaction comes within the strict letter and spirit of the statute governing conditional sales. Revised Statutes, 1889, secs. 5180, 5181, 5187. (2) If this were not true, still appellant admits this was a case where "personal property" was "sold to be paid for in whole or in part in installments." The language of Revised Statutes, 1889, section 5180, is broad enough to cover every case where property is sold to be paid for in whole or in part in installments. *Gentry v. Templeton*, 47 Mo. App. 55–59.

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Smith, P. J.—This is an action of replevin. Plaintiff bases his right to recover upon a chattel mortgage executed by defendant to plaintiff to secure the unpaid balance of the purchase money upon a sale of some household goods sold by plaintiff to defendant. The uncontradicted evidence shows that there was default in the payments provided for by the mortgage. The non-payment of the debt, by the terms of the mortgage, gave plaintiff the right to the possession of these goods, and, after demand made therefor, this replevin suit was brought.

The trial court, it appears from the instructions given and refused, took the view that sections 5180 and 5181, Revised Statutes of Missouri of 1889, applied to any sale of chattels where a portion of the purchase money remained unpaid, and was to be paid in installments, notwithstanding, as in this case, the goods were sold and title conveyed to the purchaser, who executed a chattel mortgage to secure such unpaid installments. And further that plaintiff could not take the goods described in this mortgage without tendering or refunding to the purchaser the sum or sums paid by him after deducting a reasonable compensation for the use of such property, and as plaintiff had not made such payment or tender the jury were peremptorily directed to find for the defendant.

Section 5180, Revised Statutes, just referred to, provides that in all cases where any personal property shall be sold to any person to be paid for in whole or in part in installments on condition that the same shall belong to the person purchasing the same whenever the amount paid shall be a certain sum, the title to the same to remain in the vendor until such sum or any part thereof shall have been paid, such condition in regard to the title so remaining until such payment shall be void as to all subsequent purchasers

in good faith, and creditors, unless such condition shall be evidenced by writing executed, acknowledged and recorded as provided in cases of mortgages of personal property. And section 5181 provides that, whenever such property is so sold, it shall be unlawful for the vendor to take possession of said property without tendering or refunding to the purchaser the sum or sums of money so paid, after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed twenty-five per cent. of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in the contract or not, unless such property has been broken or actually damaged, and then a reasonable compensation for such breakage or damage shall be allowed.

Prior to the enactment of the foregoing statutory provisions it had been several times held in this state that the seller of personal property might by contract with the buyer reserve the title of such property in himself, until payment was made, and that such reservation would be valid against a *bona fide* purchaser. *Wangler v. Franklin*, 70 Mo. 659; *Robbins v. Phillips*, 68 Mo. 100; *Sumner v. Cottey*, 71 Mo. 121. These sections were intended by the legislature to make a radical change in the law relating to the sales of personal property, and to prevent secret and unrecorded transactions and contracts of sales from being used to the detriment of creditors of or purchasers from the vendee of personal property apparently the owner thereof.

In this case there is no creditor or purchaser of the vendee concerned. The controversy is between the parties to the mortgage. That the case does not come within the purview of the statute already referred to, is as plain as anything can be. Here, the plaintiff in the usual and customary way sold the goods in question

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to the defendant, the latter at the same time paying part of the purchase price, executing a mortgage on the goods so purchased to secure the deferred payments. The title was not to remain in the plaintiff until all of the installments were paid, but it passed to the defendant by the very nature of the transaction. If this were not so, why did defendant execute the mortgage to plaintiff covering the identical goods? If the goods were not his, why mortgage them to plaintiff? The statutes (sections 5180, 5181) have no application to a case like this where there was an absolute sale by the plaintiff to defendant of the goods, and a mortgage executed back by the latter to the former to secure the purchase price. *Daily v. Mfg. Co.*, 88 Mo. 301; 14 Mo. App. 597.

This case is not different from that where A sells a horse to B, and the latter pays the former a part of the purchase price and executes a mortgage to him to secure the deferred payment or payments. The contract of sale, the payment of part of the purchase money, and the execution of the mortgage back to secure the deferred payments, are all parts of the transaction, executed simultaneously and before the horse is taken out of the stable. This is the usual way of conducting such transactions. It is likely the plaintiff did not actually deliver the goods to defendant until the mortgage was signed, but in the contemplation of the parties the sale was effected first and was so regarded by both of them. And such a transaction we feel bound by law to recognize and uphold as valid.

It results that the judgment must be reversed and the cause remanded. All concur.

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J. Frank Tomlin *et al.*, Respondents, v. The Farmers & Merchants Bank, Appellant.

Kansas City Court of Appeals, January 16, 1893.

1. **Corporations:** ELECTION OF DIRECTORS: RIGHT TO CUMULATIVE VOTING: SILENCE. The right of the shareholders of a corporation to vote in the election of directors on the cumulative plan is one guaranteed by law, constitutional and statutory, is personal to them to be exercised as each may for himself elect, and cannot be taken away by resolution or by-law adopted by a majority of the shareholders, and such right will not be affected by mere silent acquiescence in the act of others.

2. ———: ———: SETTING ASIDE ELECTION OR INSTALLING ELECTED DIRECTORS. In a proceeding under sections 2520 and 2521, Revised Statutes, 1889, to inquire into the election of the directors of a corporation, where the report of the inspectors shows they have followed the law and certified and returned all the votes as cast, and the wrong is in the organization of the directory in recognizing as a director A, not elected, instead of B, who was elected, it is error to set aside the election, but the court should oust A and seat B. unless something transpired which prevented votes being tendered in accord with the free will of the voting stockholders.

3. ———: ———: ———: ———. *Arguendo* the following rules are discussed: When legal votes tendered by the complaining party are rejected, he thereby falling short of a majority cast, he cannot be installed, and a new election should be ordered. In New Jersey if the received and rejected votes make a majority for the complaining party, he should be seated without a new election.

4. ———: ———: AGREEMENT TO VOTE FOR CERTAIN PARTIES. Whether an agreement of certain stockholders, expressed to be for the benefit of the corporation, not to sell stock or grant proxies, or vote for any one outside of their number, is against public policy, is not decided, since, if void, it is harmless and free from immorality, and it is a dangerous precedent to permit an inquiry into the motive of the shareholder in choosing a directory.

Appeal from the Pettis Circuit Court.—Hon. Richard Field, Judge.

Reversed.

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Sangree & Lamm, for appellant.

(1) The so-called contract between the holders of eighty shares of stock to keep the same scattered and control the policy of the bank to that end was not an illegal or unfair confederating, nor was it against public policy. The majority of the stockholders have the clear right to unite on the policy to be pursued by them. *Faulds v. Yates*, 57 Ill. 416; 11 Am. Rep. 11; 1 Lawson's Rights, Remedies & Practice, p. 811; 1 Morawetz on Private Corporations [2 Ed.] sec. 477, and note 1 on p. 451, and authorities cited; *Havemeyer v. Havemeyer*, 43 N. Y. Sup. Ct. 506; Cook's Stock & Stockholders & Corporation Law [2 Ed.] sec. 618, and notes; *Cone's Ex'rs v. Russell*, 21 Atl. Rep. 847; *Fell's Appeal*, 91 Pa. St. 434. The contract is not obnoxious to the cumulative system of voting. *Pierce v. Commonwealth*, 104 Pa. St. 150; Abbott's Trial Evidence, 364; *Corder v. Straszer*, 8 Mo. App. 61. (2) The election was legal. The cumulative system was used. Tomlin's partisans voted cumulatively; their votes were received and fairly counted and reported as "multiplied votes." *Pierce v. Commonwealth*, 104 Pa. St., *supra;* Revised Statutes, 1889, sec. 2490; Constitution, art. 12, sec. 6. No legal vote was rejected. Hence, it was error for the court to order a new election. "The circumstances and justice of the case" did not require it. Cook's Stock & Stockholders & Corporation Law [2 Ed] sec. 616; Revised Statutes, 1889, sec. 2521; McCrary on Elections [3 Ed.] sec. 531. These twelve men were entitled to the offices they held. Can they be taken from them by a summary proceeding against the corporation itself to which they are not parties? Tomlin should have, possibly, been allowed to have the benefit of a writ in the nature of a *quo warranto* against Vaughan, if he would not surrender otherwise. The

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statute under which this proceeding is brought contemplates this. Revised Statutes, 1889, sec. 2522. And the courts have sanctioned that remedy. *State ex rel. v. Farris*, 45 Mo. 183; *State ex rel. v. Kupferle*, 44 Mo. 154; *Commonwealth v. Graham*, 67 Pa. St. 339; *People v. Tibbitts*, 4 Cow. 358; *Creek v. State*, 77 Ind. 180; *State v. McDaniel*, 22 Ohio St. 354. The petition alleges that John Elliott was elected. The proof shows that he received a unanimous vote. By some droll irony he failed of an election at the new election held under the court's order. Can he be robbed of his office without his day in court? If no director but Elliott was legally elected his election should stand, and it was error to hold otherwise. *Vandenburgh v. Railroad*, 29 Hun, 348; *Wright v. Commonwealth*, 109 Pa. St. 560; McCrary on Elections [3 Ed.] secs. 630, 631 (3) When an election is held by duly appointed officers the presumption is that the votes they received and counted are legal, and it devolves upon him who asserts their illegality to show it. *Gumm v. Hubbard*, 97 Mo. 317. It does not appear from the record that, if Tomlin had demanded his office as director after the election, he would have been denied the same. He should have asked redress at the hands of the corporation. *Albers v. Merchants Exchange*, 45 Mo. App. 207.

Jackson & Montgomery, for respondents.

(1) The stockholders in the defendant corporation were entitled to vote their stock on the cumulative plan, and it was in violation of the law of this state to elect directors in any other manner. Constitution, art. 12, sec. 6; Revised Statutes, 1889, sec. 2490. (2) Any by-law of the corporation and any contract among any of its stockholders, in conflict with this constitutional and statutory provision, are void. *People v. Phillips*,

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1 Denio, 398; *Fisher v. Bush*, 35 Hun, 641. (3) The rejection of the legal votes cast by the plaintiffs, and the refusal to count them as cast, invalidated the whole election. *In re Railroad*, 19 Wend. 37; s. c., 32 Am. Dec. 429, and note, p. 437. And the remedy in such case was a new election. Angell & Ames on Corporations, sec. 138; *People v. Phillips*, 1 Denio, 396. Legal votes having been rejected by the inspectors, the court could not count them for either party, especially as most of the votes cast were illegal. *Hartt v. Harvey*, 19 How. Pr. 252. The court was expressly authorized to order a new election by section 2521, Revised Statutes, 1889.

Ellison, J.—This is a proceeding under sections 2520, 2521, Revised Statutes, 1889, whereby plaintiffs seek to have an election of directors for the defendant bank set aside and a new one ordered. Their petition was granted below after being duly heard, and defendant has brought the case here.

Plaintiffs and many others were stockholders in the defendant corporation formed for banking purposes. The stockholders met in the office of the bank on January 6, 1891, for the purpose of electing directors for the ensuing year. At this meeting the following resolution or motion was introduced by a shareholder, and carried, for the purpose of governing the election, viz.:

"Mr. President, I move you that we proceed to elect thirteen directors for the ensuing term in accordance with our by-laws, each shareholder being entitled to one vote for each share held by them. or proxies; to vote for thirteen different directors, and that the thirteen different names receiving the highest number and a majority of the shares voted be declared the duly elected directors."

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"Motion carried almost unanimously. There was in evidence for plaintiffs an agreement among certain stockholders whereby they agreed upon their honor not to sell their stock or vote for directors except to and for those signing the agreement. Plaintiffs refused to render obedience to the resolution and voted on what is known as the cumulative plan; a plan the resolution was designed to prevent. The cumulative vote by stockholders is authorized by the constitution and laws of this state. Constitution, art. 12, sec. 6; Revised Statutes, 1889, sec. 2490. By that plan the stockholder may cast a number of votes equal to the number of shares held by him multiplied by the number of directors to be voted for, and he may distribute the total of such vote as he may desire, among the directors to be elected. As stated by the supreme court of Pennsylvania, speaking of a similar provision, in *Pierce v. Commonwealth*, 104 Pa. St. 154: "This section to us seems very plain and unambiguous. If there are six directors to be elected, the single shareholder has six votes, and, contrary to the old rule, he may cast those six votes for a single one of the candidates, or he may distribute them to two or more of such candidates as he may think proper. He may cast two ballots of each of three of the proposed directors, three for two, or two for one and one each for four others, or, finally, he may cast one vote for each of the six candidates."

After the adoption of the resolution as above set forth, the election was proceeded with; the inspectors certified to the following vote, viz.:

	Shares of stock.		Shares of stock.
M. Doherty	83	J. F. Mitchell	83
R. H. Nelson	79	B. F. Stephens	81
J. A. Fults	83	John Elliott	102
M. H. Brown	83	C. W. Leabo	78
B. F. Stephens	83	Geo. E. Hollenbeck	83
J. H. Crawford	79	Jas. Vaughan	77
John Spickert	83		

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	Shares of stock.	Multi-plied vote.
J. F. Tomlin	19	84
Jas. McCampbell	21	61
C. H. Fisher	19	43
John Laney	19	30
Wm. Martin	5	44
E. H. Hall	7	3
R. Denny	3	
G. W. Rayburn	2	

Total, 1293 and 102 shares voted.

(Signed) WM. BAKER,
E. H. HALL,
E. DURAND,
Inspectors.

The inspecting board, having made the above report to the president of the meeting, he declared the following-named men duly elected directors for ensuing year: "M. Doherty, J. F. Mitchell, Henry Nelson, B. F. Stephens, J. A. Fults, John Elliott, M. H. Brown, C. W. Leabo, B. F. Stevens, Geo. E. Hollenbeck, J. H. Crawford, Jas. Vaughan and John Spickert, on the grounds of their receiving the highest number of stock voted." This board organized by electing officers and taking charge of the affairs of the bank.

It appears by these proceedings that by the plan of voting under the foregoing resolution the directors declared to be elected were elected, but by the cumulative plan as carried out by plaintiffs, Tomlin and others, he was elected. It also appears that he was not so recognized, and that the resolution was considered and obeyed by the directory, as organized, as the law directing and governing the election. The question then is, is such resolution contrary to the letter, spirit and intention of the constitution and statute on the subject of such elections and the rights of stockholders? A reading of the resolution and the law is a full answer to the question. They are in direct antagonism. The further question then occurs, can a majority of the stockholders of a corporation control the law as to the corporation, or place it in abeyance? The answer

to this is evident from the mere statement. The right is one guaranteed by the law, constitutional and statutory, it is personal to the stockholder, it can be exercised or not by such stockholder as he may himself elect. *Pierce v. Commonwealth*, 104 Pa. St. 155. It, therefore, cannot be taken from him by a resolution or by-law adopted by a majority of shareholders.

It is stated by counsel that these plaintiffs sat by in silence when this resolution was adopted, and that the election proceeded under it without protest from them. It is however quite apparent that the privilege of cumulative voting is such a right as will not be affected by mere silent acquiescence in the act of others. The personal privilege is at the volition of the stockholder up to the time of casting his vote.

The question next presented by counsel is, whether in the status of this case the trial court should not have declared plaintiff Tomlin elected and installed him instead of setting aside the election and ordering another. The rule is stated that, when legal votes tendered for the complaining party are rejected, he thereby falling short of a majority cast, yet he cannot be installed since he has not been elected by the vote received or cast; and a new election is ordered. *In re Long Island Ry. Co.*, 19 Wend. 37; *State v. McDaniel*, 22 Ohio St. 354; *State v. Swearingin*, 12 Ga. 23; *People v. Phillips*, 1 Denio, 388. It is, however, held in New Jersey, under a statute substantially like ours, that if the legal votes rejected were, together with those cast for the complaining party, a majority of the total outstanding stock of the corporation, no new election would be ordered, and the complainant would be seated. 1 Beach on Private Corporations, sec. 302; *In re Cape May & D. B. N. Co.* (1889), 15 Atl. Rep. 191; *In re Steamboat Co.*, 44 N. J. Law, 529. The language of the latter case would seem to authorize the installation of a

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complainant, in some instances where justice seemed to demand it, who had a majority of legal votes counting those cast and tendered, although they were short of a majority of the total stock outstanding.

We are not compelled to chose between these authorities, if they may be considered in antagonism, for in the case at bar there were no votes rejected by the inspectors; they were certified and returned by those officers as cast. The inspectors appear to have complied with sections 2484, 2490, Revised Statutes, 1889. The wrong was perpetrated in the *organization* of the directory and not in their election. By the organization, Vaughan, who was not elected, was recognized and acted as a director, while plaintiff Tomlin, who was elected, as duly appeared by the return and certificate of the inspectors, was not recognized. Under these circumstances, ordinarily, the court should have ousted Vaughan and seated Tomlin. This should have been done unless it is apparent from the proceeding had at the election, that "the circumstances and justice of the case shall seem to require" some other disposition. The court did not install Tomlin, but, as has been stated, set aside the entire election and ordered another. Such action of the court could not have been based upon the idea that the illegal resolution against cumulative voting had been obeyed by the inspectors, for they, as a matter of fact, disobeyed the resolution and obeyed the law by actually receiving and counting all cumulative votes tendered them. Unless, then, something transpired which prevented votes being tendered in accord with the free will of the voting stockholders, we must hold the court's conclusion in ordering a new election as unwarranted, for by such order twelve duly elected and uncomplaining directors are ousted from an office conferred upon them at a legal election.

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No stockholder testified that he did not vote in accordance with his individual volition and preference. The return of the election by the inspectors shows, that the resolution did not govern or affect a number of the stockholders, and there is nothing to show us that it affected any of them. We shall, therefore, not consider that it did affect them. This leaves the matter then in this respect to stand on the agreement made between certain stockholders, whereby they agreed with each other, "upon our (their) honor," that they would not sell their stock, or grant proxies to parties outside those executing the agreement. Nor would they vote for any one for director who was not a signer of the agreement. This instrument was entered into for the purpose, as therein declared, of preventing any one person or syndicate from getting control of a majority of the stock, to the end that it might remain scattered and thereby redound to the benefit of the bank. This agreement is attacked by plaintiffs as being against public policy and without consideration. *Fisher v. Bush*, 35 Hun, 641. While on the other hand it is defended as being supported by legal principles. *Faulds v. Yates*, 57 Ill. 419; *Fell's Appeal*, 91 Pa. St. 437. We will not make a decision of such questions, since, in our opinion, if the contract be void, as such, it amounts to no more than a harmless agreement to act in concert as to certain policies to be pursued in which they had a common interest. There was nothing immoral in it, and if not a valid obligation there was, of course, nothing binding in it. It would be a dangerous and far-reaching precedent to permit an inquiry into the motive which is alleged to control or influence the shareholder in making his choice of a directory. The judgment or order of the court should have been to oust Vaughan and seat Tomlin. The order for a new election should not have been made.

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As the term of the directory over which this proceeding originated has long since passed, we can see no reason for remanding the cause for another trial, and, therefore, simply reverse the judgment. All concur.

SMITH M. FORD *et al.*, Respondents, v. THE KANSAS CITY & INDEPENDENCE SHORT LINE RAILROAD COMPANY *et al.*, Appellants.

Kansas City Court of Appeals, January 16, 1893.

1. **Corporations**: RECEIVERS: ACTION: PLEADING. A railroad corporation had collected only five per cent. of its capital stock, which it had expended. Judgments had been rendered against it, which, in default of assets, had been, on proper legal proceedings, paid by the plaintiffs as stockholders therein, and other debts and judgments existed; the officers and directors of the corporation had not met for eighteen months, and had made no provision for its debts; its franchises were abandoned and it had no assets. Some of its shareholders are non-residents and some are insolvent, and plaintiffs are about to have cast upon them the payment of the entire corporate indebtedness. *Held*, plaintiffs can maintain a bill for the appointment of a receiver, to assess the stockholders to pay debts, etc., and plaintiffs' petition, summarized in the opinion, states a good cause of action. (*Following Thompson v. Greeley*, 107 Mo. 577.)

2. ———: ———: POWERS OF COURTS. No interference with the management of a corporation can be justified, and courts have no jurisdiction to appoint receivers in the absence of statutory authority, except in cases of extreme necessity.

3. ———: UNCOLLECTED STOCK: CORPORATE DEBTS. Unpaid stock is a trust fund for all the debts of the corporation, and a court of equity will provide a remedy to compel delinquent shareholders to contribute their ratable proportion to the discharge of corporate debts.

4. ———: FORFEITURE OF CHARTER: RAILWAY EXPENDING MONEY: STATUTES CONSTRUED: TRUSTEES. Under section 2664, Revised Statutes, 1889, if a railway corporation does not begin the construction of its road within two years, and within one year thereafter expend thereon not less than ten per cent. of the capital stock, such failure *ipso facto* extinguishes its corporate powers and existence,

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and it accomplishes not only a dissolution of the corporation, but divests the president and directors of their powers as such, and invests them with the specific powers enumerated in section 2513, Revised Statutes, 1889; and this is adhered to on rehearing, and the cases of *Bank v. Garton*, 34 Mo. 123, and *Bank v. Bredow*, 31 Mo. 538, are distinguished, and the banking law of 1855–6–7 is construed.

5, ———: DISSOLUTION: SERVICE OF PROCESS: TRUSTEES. Where a railway corporation is dissolved by the force of section 2664, Revised Statutes, 1889, service of process upon its president or managing officer can confer no jurisdiction over the person of the dead corporation, as such officers can neither appear nor defend for such corporation.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

REVERSED AND REMANDED.

Flournoy & Flournoy, for appellant.

(1) A court of equity has no jurisdiction, in the absence of a statute expressly conferring such jurisdiction, to appoint a receiver for a corporation and to wind up its affairs. High on Receivers [2 Ed.] secs. 287, 288, 298, 299, 313, 343, 365, note 1; Beach on Receivers, secs. 403, 409, 415; *Pond v. Railroad*, 130 Mass. 194; *Trust Co. v. Railroad*, 101 N. Y. 478; *Baker v. Railroad*, 34 La. Ann. 754; s. c., 9 Am. Corp. Cases, 366; *Neal v. Hill*, 16 Cal. 145; *Case of People ex rel.*, 31 Mich. 456; *Jones v. Bank*, 10 Col. 464; *Brown v. Bank*, 5 Mo. App. 1, approved in *Co. v. Davidson*, 13 Mo. App. 561, 565, 567; *Hannah v. Bank*, 67 Mo. 678; *Trust Co. v. Storage Co.*, 23 Atl. Rep. (N. J. Ch.) 934. (2) The above principle is to be qualified by the proviso, that in case of extreme necessity a receiver of property can be appointed over a corporation in the exercise of original equity jurisdiction. *Thompson v. Greely*, 107 Mo. 577; Beach on Receivers, secs. 404, 405; High on Receivers, sec. 288. (3) No statute in

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this state authorizes the appointment of a receiver over a railroad corporation. The sections of our statutes pertaining to the appointment of receivers over corporations are the following, all of which appear in the same form in the revision of 1879, except where noted: Secs. 2193, 2194, 2195, general authority to appoint receivers; secs. 2790, 2791, 2792, case of manufacturing and business corporations; sec. 2835, benevolent, religious, scientific, fraternity, beneficiary and educational associations; secs. 5938 to 5955, insurance companies; sec. 2525, Laws of 1883, p. 49, corporations in general; secs. 550, 551, 552, 553, 554, receiver under attachment law. (4) Such statutes are to be strictly construed. High on Receivers, sec. 289, p. 184; Beach on Receivers, sec. 408, p. 344. (5) We return then to equity jurisdiction in cases of extreme necessity. No case of extreme necessity demanding the extraordinary relief of a receiver over a corporation is shown in this proceeding. No such a case is stated in plaintiffs' bill of complaint. Gluck & Beeker on Receiver of Corporations, secs. 22, 25; High on Receivers, secs. 292, 293, 343; Beach on Receivers, sec. 404; *Baker v. Backus, Adm'r*, 32 Ill. 79; cases cited under point 2. (6) The remedy of a creditor of an insolvent corporation who seeks to reach its unpaid stock subscription in equity is known as a creditor's bill. Cook on Law of Stocks & Stockholders, sec. 204, p. 190; Thompson on Liability of Stockholders, sec. 9, *et seq.*; 2 Morawetz on Private Corporations, sec. 820; *Leucke v. Tredway*, 45 Mo. App. 507; *Thompson v. Bank*, 19 Nev. 103; s. c., 3 Am. St. Rep. 797; *Hatch v. Dana*, 101 U. S. 210; *Dunston v. Hop-tonic Co.*, 83 Mich. 372; *Bell's Appeal*, 115 Pa. St. 88; s. c., 2 Am. St. Rep. 532; *Ogilvie v. Ins. Co.*, 22 How. 380; *Bassit v. Nav. Co.*, 15 Fed. Rep. 353; *Allen v. Railroad*, 11 Ala. 437; *Jones v. Jarman*, 34 Ark. 323, 328; *Hightower v. Thornton*, 8 Ga. 486;

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s. c., 52 Am. Dec. 412; *Mann v. Pentz*, 3 N. Y. 415; *Basset v. Hotel Co.*, 47 Vt. 313; *Patterson v. Lynde*, 112 Ill. 196, 204, 207. (8) The corporation itself is a necessary party defendant in any proceeding to appoint a receiver over it. High on Receivers, sec. 290; Beach on Receivers, sec. 413. (9) At the time this proceeding was begun, the defendant railroad was dissolved: *First.* Either by the limitation of its own charter, whereby it had ceased to exist. Revised Statutes, 1889, sec. 2664; Cook on Law of Stocks & Stockholders, sec. 628; Beach on Receivers, sec. 429; 2 Morawetz on Private Corporations [2 Ed.] secs. 1004, 1005, 1006; *Matter of Railroad*, 72 N. Y. 245; *Railroad v. Oakland*, 45 Cal. 365; s. c., 13 Am. Rep. 181. *Second.* Or by a virtual surrender of its charter and abandonment of the corporate enterprise. *More v. Whitcomb*, 48 Mo. 543; *Powell v. Railroad*, 42 Mo. 63, 67; *Savings Ass'n v. Kellogg*, 52 Mo. 583, 588; *Shickle v. Watts*, 94 Mo. 410; *Adams v. Mill Co.*, 35 Fed. Rep. 433; *Mill Co. v. Kamp*, 38 Mo. App. 229; *State ex rel. v. Brockman*, 39 Mo. App. 131; *Slee v. Bloom*, 19 John. 456; *Kehlor v. Lademann*, 11 Mo. App. 550.

Scott Ashton and *J. S. Brooks*, for respondents.

(1) The corporation is the proper party defendant on an application for the appointment of a receiver and the stockholders and directors were not necessary parties in this proceeding. Beach on Receivers [1 Ed.] sec. 413, p. 349; *Sanger v. Upton*, 91 U. S. 56; *Hawkins v. Glenn*, 131 U. S. 319; *Glenn v. Liggett*, 135 U. S. 533; *Gravenstine's Appeal*, 49 Pa. St. 310; *Mickles v. Bank*, 11 Paige, 118. (2) If the owners of a majority of the stock in a corporation neglect to elect officers, and it appears that there is no person authorized to conduct the affairs of the corporation, or

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if the directors and officers abandon the corporation and its franchises and property, a receiver may be appointed on the application of a stockholder. Beach on Receivers, secs. 86, 87; *Lawrence v. Ins. Co.*, 1 Paige, 587; *Haywood v. Lumber Co.*, 64 Wis. 639; *Sheppard v. Oxenford*, 1 Kay & J. 491; *Evans v. Coventry*, 5 DeG., M. & G. 911. It is a general rule that insolvency is a sufficient reason for the appointment of a receiver of the property and franchises of a corporation. Also cases of extreme necessity, viz.: Such as where the corporate property is abandoned, or where there are no persons authorized to take charge of its affairs. Where the corporation abandons its franchises. Where corporation has ceased to do business, and is unable to resume on account of its insolvency. Beach on Receivers, secs. 86, 87, 88, 89, 404, 415, 416; *Thompson v. Greely*, 107 Mo. 577; *Greely v. Bank*, 103 Mo. 212; *Cox v. Volkert*, 86 Mo. 505; *St. Louis v. Gaslight Co.*, 11 Mo. App. 237; 87 Mo. 223; *Conro v. Gray*, 4 How Pr. 166; *Matter of Bank*, 10 How. Pr. 498; *Hightower v. Thornton*, 8 Ga. 486; *In re Bank*, 35 La. Ann. 196; *Lawrence v. Ins. Co.*, 1 Paige, 587; *Devoe v. Railroad*, 5 Paige, 521. (3) The court could appoint a receiver at any time after issue of summons upon notice being given. *Greely v. Bank*, 103 Mo. 222; Beach on Receivers [1 Ed.] secs. 107, 109, 110; *Maynard v. Railey*, 2 Nev. 313; *Clark v. Ridgely*, 1 Md. Ch. 70; *Bloodgood v. Clark*, 4 Paige, 574; *Gill v. Balis*, 72 Mo. 429; *Jones v. Doherty*, 10 Ga. 273; *Duckworth v. Wofford*, 18 Ves. 253; *Davis v. Brown*, 2 Del. Ch. 188; *Moses v. Micon*, 72 Ala. 439; *Blondheim v. Moore*, 11 Md. 365. (4) The defendant corporation is not so far dissolved that it may evade its liabilities to its creditors, or that it may not have a receiver appointed to take charge of its affairs. For the purpose of this proceeding the corporation is not dissolved, till by a

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judicial decree it is declared so. *Savings Ass'n v. Kellogg*, 52 Mo. 590; 2 Beach on Private Corporations, sec. 786, p. 1226; *Hotel Co. v. Sauer*, 65 Mo. 279; *Buford v. N. P. L. Co.*, 3 Mo. App. 159; *Bank v. Pulitzer*, 11 Mo. App. 594; *Ins. Co. v. Floyd*, 74 Mo. 286; *Mining Co. v. City of St. Louis*, 11 Mo. App. 55; 84 Mo. 379. This application of respondents for a receiver is a suit, apart from its asking that the affairs of the corporation be wound up, and it required to pay judgments against it. The respondents asked for reimbursement for money paid in its behalf; so that they are interested parties to the proceeding. A receiver may be appointed for these purposes. 5 Wait's Actions & Defenses [Last Ed.] 359; vol. 1, pp. 9, 20; Beach on Receivers [1 Ed.] sec. 86; *Stark v. Burke*, 5 La. Ann. 740; *Haywood v. Lumber Co.*, 64 Wis. 639; *Lawrence v. Ins. Co.*, 1 Paige, 587; *Kennedy v. Railroad*, 2 Dillon, 448; *Conro v. Gray*, *supra*.

SMITH, P. J.—The petition of the plaintiffs alleged: "*First.* That the Kansas City & Independence Short Line Railroad Company is a corporation organized and existing under and by virtue of the laws of the state of Missouri; that the capital stock of said corporation is $100,000, divided into one thousand shares of the par value of $100 each.

"*Second.* That at the time of the organization of said corporation all of the capital stock was subscribed for by parties in the state of Missouri and elsewhere, and five per cent. of the capital stock of said corporation was paid into the treasury of said corporation by the stockholders, and that no other sum of money has ever been paid into the treasury by any stockholder thereof.

"*Third.* That S. M. Ford, one of the plaintiffs herein, subscribed for and is the owner of fifty shares

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of the capital stock of said corporation, and that D. S. Orrison, the other plaintiff herein, subscribed for and is the owner of three shares of the capital stock of said corporation.

"*Fourth.* That there are about fifty stockholders in said corporation holding from one hundred shares to one share each, and that some of the stockholders in said corporation are non-residents of the state of Missouri, and that quite a number of the stockholders of said corporation are insolvent.

"*Fifth.* That the money heretofore mentioned and paid into the treasury by the stockholders has been expended, and other debts and liabilities contracted by said corporation amounting to about the sum of $2,000, which has been unpaid by said corporation; that said corporation has no property or assets, and is wholly insolvent; that Victor Bell recovered a judgment which is of record in the circuit court of Jackson county, for the sum of $166.08, and costs; that Kevil & Waples recovered a judgment against said corporation for the sum of $76.95, which is of record in said circuit court; that after the obtaining of said judgment the said judgment creditors in said respective judgments again filed a motion under the statute asking judgment against plaintiff, D. S. Orrison, and judgment in said two actions was rendered against plaintiff, D. S. Orrison, for said amounts above stated, which judgment so rendered was by D. S. Orrison paid.

"That C. S. Crysler, in the said circuit court of Jackson county, Missouri, recovered a judgment against said corporation, which, together with costs, amounted to the sum of $1,070; that after the obtaining of the said judgment said judgment creditor filed a motion in said action under the statute asking judgment against plaintiff, S. M. Ford, upon his unpaid stock, and a judgment upon said motion was rendered

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against plaintiff, S. M. Ford, for the said sum of $1,070. Plaintiffs further represent and show that there are other judgments and claims remaining unpaid that have been rendered against and owing by said corporation.

"*Sixth.* That they, by reason of said judgments so rendered against them, and such other stockholders as may be compelled to pay said other judgments and outstanding claims, are entitled to contribution from the remaining stockholders of said corporation that are solvent; that no stockholder has paid into the treasury or expended any money for said corporation other than the five per cent. paid in as heretofore stated, and that all of the stockholders of said corporation are liable to plaintiffs for their proper and proportionate share towards paying said judgments.

"*Seventh.* That said corporation was organized in April, 1887, since which time and for the last eighteen months there has been no meeting of the board of directors and officers of said corporation, and that said officers and directors have failed to call in any proportion of the unpaid installments due from the stockholders upon the capital stock due by the stockholders to the corporation, and have failed and neglected to make any provision for the payment of the judgments rendered against said corporation and the debts owing by said corporation.

"*Eighth.* That a number of the stockholders of said corporation are non-residents of this state, a number are insolvent, and the only way in which a fair and equitable settlement of the debts of said corporation can be made by the solvent stockholders thereof is by the appointment of a receiver, with the power to collect from such solvent stockholders their proper and proportionate share necessary to pay the debts of said corporation and the proper costs of these proceedings."

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The prayer was that "said corporation may be wound up and dissolved, and to that end that a receiver be appointed herein with full power and authority to take possession of the books, papers and property of said corporation, and that such receiver, under the order of this court, be given authority to collect the unpaid installments of the stockholders sufficient in amount to properly reimburse your orators and pay such other and remaining judgments and debts as are owing by said corporation, together with the costs of these proceedings."

The defendant corporation failed to appear and defend the suit. At the return term of the writ the court on the application of the plaintiffs made an order, appointing a receiver, enumerating his powers therein.

At the October term following, the other defendant Cusinbary was on his application made a party defendant, and, thereupon, filed a motion to vacate the order of the court theretofore made for the appointment of the receiver, etc. This motion was sustained as to that part of the order which conferred upon the receiver authority to sue for assets and collect the unpaid subscriptions of stockholders, and overruled as to that part appointing him. Subsequently the receiver filed an application for instructions, and also made a report showing the names of the solvent stockholders of the corporation, the indebtedness of the corporation, etc. Upon the hearing of the application, testimony was received by the court, the tendency of which was to show that, of the stock subscribed to the corporation, only about $1,600 or $1,700 had been paid; that this amount had been paid out for attorney's fees, surveying, etc.; that judgments had been rendered against plaintiffs as shareholders in favor of certain

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corporation creditors, which had not been fully paid by them, etc.

The court thereupon ordered an assessment of twenty per cent. on the shares of stock to be made for the purpose of paying the indebtedness of the corporation, and that such shareholders as had, theretofore, made payments be credited therewith, and that the same be deducted from the amounts assessed against them, and that the receiver be authorized to sue for and collect such assessments, and to hold the same subject to the orders of the court. The allegations of the petition were not controverted by an answer of either of the defendants. After successive motions for a new trial, and in arrest had been severally overruled, the defendant Cusinbary took this appeal.

The grounds of appeal assigned by the appealing defendant are: *First.* Plaintiffs' bill of complaint did not state a cause of action, or any facts invoking equity jurisdiction. *Second.* The lower court had no jurisdiction of the person of the defendant, Kansas City & Independence Short Line Railroad Company, at the time the receiver in this cause was appointed. *Third.* There is a defect of necessary parties defendant to plaintiffs' bill of complaint. We will examine *seriatim* these several assignments.

As to the first of these, it may be premised that this proceeding is outside and independent of any statutory provision in this state relating to the appointment of receivers. As a general principle courts have no jurisdiction to appoint receivers in the absence of express statutory authority, except in cases of extreme necessity. Beach on Receivers, sec. 404; *Thompson v. Greely*, 107 Mo. 577. The supreme court of this state, in the case just cited, fully recognizes the power of the courts of equity to appoint receivers and to sequestrate the property of corporations for the protection of

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stockholders and creditors in cases of extreme necessity. As to what are cases of extreme necessity in the absence of statutes, it is often quite difficult to determine. It is a general rule that insolvency or abandonment of the franchises of the corporation affords a sufficient reason for the appointment of a receiver of the corporate property and franchises. Mr. Beach, in his work on receivers, in the section above referred to, states that cases of extreme necessity are such as where the corporate property has been abandoned, or where there are no persons to take charge of its affairs. That author in the same connection remarks that there are other cases where courts of equity in the exercise of their original jurisdiction will appoint receivers of the property of corporations, as, for example, where a corporation had no officers to take care of its property and manage its offices, and was without an office or place of business, a receiver was appointed on the application of a stockholder to preserve its effects for the benefit of creditors and stockholders. In section 281 of Morawetz on Private Corporations, it is stated that a court of equity will grant all relief to a shareholder which the nature of the case may require. But it has always been a settled principle that no interference with the management of a corporation can be justified, unless such interference be absolutely necessary to the attainment of justice. As to the power of courts of equity to appoint a receiver of corporations in the absence of statutory authority, there seems to be a great diversity of opinion existing both among the courts and the elementary writers on equity jurisprudence, and were it not for the very able opinion of Judge MACFARLANE in 107 Mo. *supra*, affirming the existence of this jurisdiction, we should have been greatly inclined to doubt it. The ruling there made is conclusive upon us.

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Now, in the light of the foregoing principles, does the petition show the plaintiffs entitled to the appointment of the receiver? It is, of course, essential that the petition show the plaintiffs have an interest in the subject-matter in respect to which they pray the appointment of a receiver. This condition they have fully met. They show that they are shareholders, and that they have not paid in full the stock by them subscribed; also that certain judgment creditors of the corporation have proceeded against them and obtained, under the statute, special executions against them as such shareholders. And that, unless the other solvent stockholders are compelled to pay their ratable proportion of such judgments, they may be coerced into the payment of the entire amount thereof. They are, therefore, not strangers, but are interested in having a sufficient per cent. of the unpaid stock collected to discharge the debts due by the corporation. This would be equitable and just. Now it is alleged in the petition, and not controverted, that the corporation is wholly insolvent in legal contemplation. It further appears that the officers and directors of the corporation had not met for eighteen months, and had failed to call in any proportion of the unpaid stock due by the shareholders, and had failed and neglected to make any provision for payment of the debts of the corporation; that said corporate franchises have been abandoned; that the corporation has no assets of any kind except its uncollected capital stock. These plaintiffs are about to have cast upon them the burden of discharging the entire corporate indebtedness, of which they ought only to pay a *pro rata* per cent.

The law will afford them no adequate remedy against this threatened wrong. This unpaid stock is a trust fund for all the debts of the corporation, and will not a court of equity, under these circumstances,

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make it available for this purpose—will not it provide a remedy to compel the delinquent shareholders to contribute their ratable proportion of the amount required to discharge the corporate debts? The receiver, invested with the power specified in the order of his appointment is an effective agent to accomplish this fair and just result. He can coerce the unwilling shareholder into the observance of his just legal obligation to all the parties concerned. We, therefore, think the petition states facts showing a case of extreme necessity for the appointment of a receiver within the recognized rules already referred to.

This brings us to the question of jurisdiction of the person of the defendant raised by the defendants' assignment of errors. The defendant contends that the corporation, before the time of the service of the summons in this case, had virtually surrendered its charter, whereby its dissolution was accomplished, and that, therefore, the court acquired no jurisdiction of the person of the corporation by reason of the service of the writ upon a *quondam* officer. This question must be determined with reference to pertinent existing statutory provisions. By section 2664, it is provided that if any corporation formed under article 2, chapter 42, relating to "railroad companies," shall not, within two years after its articles of association are filed and recorded in the office of the secretary of state, begin the construction of its road, and shall not within one year thereafter expend thereon not less than ten per cent. of the amount of the capital stock, its corporate existence and powers shall cease. The petition upon its face shows that it did not at any time expend on the construction on its road ten per cent. or any other per cent. of the amount of its capital.

By further reference to section 2513, the statute defining the general powers, duties and liabilities of

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corporations it will be seen that it is there provided, upon the dissolution of a corporation, the president, directors or managers shall be trustees with full power to settle the affairs, collect and pay debts, sue for and recover debts and property, and be sued as such trustees, etc. In the particulars specified the powers of the trustees seem to be the same as those of the president and directors before the dissolution, which would appear to negative the idea of the continued existence of those powers in the former corporate officers. Section 2519 further provides that, if any corporation formed under chapter 42 is dissolved leaving debts unpaid, suits may be brought against any persons who were stockholders at the time of the dissolution without joining the corporation in the suit. These are statutes *in pari materia*, and must be construed together. It seems that the omission by the corporation to comply with the requirements of section 2664 *ipso facto* operated as an extinction of its corporate powers and existence. The effect of this is to accomplish not only a dissolution of the corporation, but to divest the president and directors of their powers as such, and to invest them as trustees with the specific powers enumerated in section 2513. Upon the trustees, to the extent in that section provided, are devolved the same powers and duties as when managing officers of the corporation before it became defunct. It thus appears that the officers of the corporation became *functus officio*. They are converted by operation of law into trustees, and in such capacity alone represent the defunct corporation. As such trustees of the corporation they can sue and be sued.

It has been declared by the supreme court of this state, that under the provisions of section 19, General Statutes, 1865, page 329, which is identical with section 2513, *supra*, a corporation, which suffers acts to be

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done which have the effect of destroying the end and object for which it was created, would thereby commit an act equivalent to a surrender of its franchise—a dissolution of the corporation. *Moore v. Whitcomb*, 48 Mo. 542. In *State Savings Ass'n v. Kellogg*, 52 Mo. 583, where the facts were very much as in this case, it was declared, "that the corporation for all essential purposes was as effectually dissolved as if a solemn judgment had been pronounced to that effect." And the cases of *Morrill v. Railroad*, 96 Mo. 174, and *McCoy v. Farmer*, 65 Mo. 244, recognize the same rule.

At first blush we were inclined to think that the provisions of section 2519, allowing suits to be brought after dissolution of the corporation against the stockholders "without joining the company in such suit," was a statutory recognition of the existence of the corporation after dissolution, but further reflection convinces us that such is not the case. If the corporation has ceased to exist, if its powers are extinct and its managing officers have become *functus officio*, if such managing officers have been converted into statutory trustees of the corporation, and in that capacity alone represent the corporation, it is quite difficult to understand how in this action against the corporation the service of summons on any one of them as president or managing officer of the corporation could confer jurisdiction over the person of the dead corporation. As such managing officers they could not appear and defend the action. Nothing they could do would bind the corporation. The status of the corporation in this case is analogous to that of a corporation whose dissolution was occasioned by the expiration of its charter. The trustees in a proper case could be sued, but certainly not the extinct corporation. The logical corollary to this is that there is a defect of necessary parties to the action.

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It results that the decree of the circuit court must be reversed and annulled and the cause remanded. All concur.

ON MOTION FOR REHEARING.

SMITH, P. J.—The plaintiffs find fault with our construction of section 2664, Revised Statutes, which provides that if any railroad corporation formed under article 2, chapter 42, shall not begin the construction of its road and shall not within one year thereafter expend thereon not less than ten per cent. on the amount of its capital, "*its corporate existence and powers shall cease.*"

It stands admitted that the defendant railway company had wholly failed to comply with the said statutory requirement. It is further admitted that the corporation has only collected of its stockholders something like one and three-quarters per cent. on its subscribed capital stock, just enough to pay the engineers and attorneys who were in its service about the time of its organization. In the opinion it is held that the effect of this omission to comply with the statute was *ipso facto* to forfeit absolutely the defendant's charter without judicial determination.

The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter, does not *ipso facto* cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in a proceeding against it by *quo warranto* on the part of the state. But the legislature possesses the undoubted power to provide that a corporation may lose its corporate existence without the intervention of the courts by an omission of duty or violation of its charter, or default as to imposed

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limitations, and whether the legislature intended so to provide depends upon the language used in the statute. *The Matter of B. W. & N. Ry. Co.*, 72 N. Y. 245, was a case where a statute provided that every railroad corporation, organized under the general laws of the state of New York for the formation of railroad corporations, should begin the construction of its road and expend thereon ten per cent. on the amount of its capital stock within five years after its articles of incorporation should be filed and recorded in the office of the secretary of state, etc.; and for a failure to comply with this requirement "*its corporate existence and powers shall cease.*" It will be observed that the above *italicized* words are identical with those of our statute already quoted. It was held that this statute was self-executive, and that the existence of the corporation was determined by the omission to comply with the condition prescribed by the statute; that the omission was fatal to its corporate existence, and that the statute was not susceptible of any other reading. And in *Farnham v. Benedict*, 107 N. Y. 159, where a like question arose on the same statute, it was again declared that the corporate existence became extinct by the expiration of the limitations in the statute. So it was held in *The Matter of B. W. & N. Ry. Co.*, 75 N. Y. 335, which was a second appeal in the case from the order of the general term of the supreme court, that the corporation had ceased to be a corporation. Its powers were not simply suspended or in abeyance, but the corporation itself was extinct. It had not, by its failure to commence its road within the time limited simply incurred a liability to forfeiture, but it had ceased to exist as fully and completely as if judgment for forfeiture had been pronounced against it. So in *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524, where the transit company

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was required to have one mile of its road constructed within three years after the passage of the act authorizing its organization, or else its powers and franchises should be "deemed forfeited and terminated." The transit company failed to comply with the requirement of the act. The court held that there was to be not merely a cause of forfeiture which could be enforced in an action instituted by the attorney general, but the powers, rights and franchises were to be taken as forfeited and terminated. At the end of the time limited, the corporation was to come to an end, as if that were the time limited in its charter for its corporate existence. In *The Matter of the Kings Co. Elevated Ry. Co.*, 105 N. Y. 97, it was said that: "It is certainly well settled that non-performance of the condition of an act of incorporation will forfeit the grant, even at common law, and like effect is given to such omission by statute under which petitioner came into existence," but I am not aware of any case holding that such default does of itself work a forfeiture, or that it can take effect upon some proceeding where the question is brought directly before the court *unless the statute otherwise provides*. It is further held that those cases where the legislature intended, by a self-executing statute, to provide that a corporation shall lose its existence without the intervention of the courts, are within the above specified exception. And a similar ruling was made in *Commonwealth v. Water Co.*, 110 Pa. St. 391.

We are aware that some courts have disfavored the views expressed in the cases which we have followed in our ruling in the present case. The question under consideration has not been, as far as we have been able to discover, heretofore presented point blank to any one of the appellate courts of this state. We think, however, that the language of

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section 2664 indicates just exactly what the terms therein employed plainly imply, that is to say, that, when any one of the railroads of this state shall be guilty of non-compliance with its requirements, the existence and powers of such corporation shall cease. Language could not be plainer that the effect of such statutory disregard is not different than that where the corporate existence ceases on account of the expiration of its charter. But the plaintiff contends that *Bank v. Garton*, 34 Mo. 123, is an authority against what is held in the opinion. It was there ruled upon the authority of *Bank v. Bredow*, 31 Mo. 538, that a forfeiture cannot be enforced collaterally, but only by a direct proceeding by *scire facias*, or *quo warranto*. The case was that the bank had violated the provisions of section 5 of chapter 16, Revised Statutes, 1855, which declared that no corporation within the limits of this state should pass or receive any suspended or non-specie paying bank note or post note issued as currency. The decision was undoubtedly correct. There was no language employed in that statute indicating an intention by the legislature that the violation of the prohibitions of the section should *ipso facto* operate to extinguish the powers and existence of such bank.

But it will be seen further by reference to sections 8 and 9 of article 1 of the act of 1856–7 relating to "banks and banking" (Acts, 1856–7, 16, 17), that, while it was provided that in case any bank suspended specie payment at any time for a period of ten days, "*its charter shall cease and determine*," it is also there further provided that proceedings by *scire facias* should in such case be commenced against the bank in the proper circuit court, and, if the charge was sustained by the court, that it should annul the bank's charter. There the statute itself provides a procedure in case

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where a bank had violated the act of its charter, whereby its charter should cease and determine. By the very terms and provisions of this act the intention, such as we think is manifested by section 2664, is clearly negatived. The legislature there provided specially for the annulment of the charter by judicial decree. So that the statute upon which the rulings were made in 31 and 34 Mo. *supra*, are dissimilar in their entirety to that in question in this case, and for that reason neither of the cases lends the slightest support to plaintiffs' contention.

The plaintiffs' construction of the statute in question renders the words, "its corporate existence and powers shall cease," meaningless. Or, in other words, that the statute without these words would be just as effective as it is with them.

According to the plaintiffs' petition, the life of the defendant corporation was extinct by operation of law long before the institution of their suit, and we are unable to perceive from whence it derived the power to resuscitate it for the plaintiffs' present purpose. It results that we must adhere to the conclusion reached in the opinion.

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THEO. WINNINGHAM, Appellant, v. S. C. FANCHER, Respondent.

Kansas City Court of Appeals, January 16, 1893.

1. **Principal and Agent:** RESCINDED CONTRACT: MONEY HAD AND RECEIVED. W. agreed with F., agent of D., for the purchase of certain real estate, and W. paid to F. (for D.) $200 on account of the purchase price; D. having repudiated the agency refused to perform the contract; and thereupon W. disaffirmed and rescinded the same, and sued F. to recover the money still in his hands, without any change in his situation since its receipt. Such action is maintainable and is not on the contract of the principal D., since he has abrogated and rescinded the same.

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2. **Money Had and Received:** ACTION FOR. **The action for money had and received will lie in general wherever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund.**

3. **Principal and Agent:** AGENT'S ACCOUNTING. **The agent must be loyal to his principal, accounting to him alone; and this applies to all cases in which the agent holds a particular fund for a particular principal, provided the case be one in which the principal could recover from the agent, as he cannot in this case, since he has repudiated the agent and his contract.**

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

REVERSED AND REMANDED.

John K. Cravens and *Milton Moore*, for appellant.

(1) Whenever the defendant has received money from another to be applied to a specific purpose, for example, as part payment on the purchase price of real estate for the sale of which he assumes to be agent, but to which purpose he does not apply it, because the supposed vendor repudiates the transaction and refuses to make conveyance, and the defendant keeps the money, he is liable to the party from whom he received it, in an action for money had and received. *Railroad v. McLiney*, 32 Mo. App. 166; *Ins. Co. v. Walsh*, 18 Mo. 229; *Conley v. Doyle*, 50 Mo. 234; *Harvey v. Morris*, 63 Mo. 475; *Koontz v. Bank*, 51 Mo. 275; *Skeen v. Johnson*, 55 Mo. 24; *Fletcher v. Cole*, 23 Vt. 114; *Crossgrove v. Himmelrich*, 54 Pa. St. 203; *Manahan v. Noyes*, 52 N. H. 232; *Carey v. Curtis*, 3 How. (U. S.) 236, 246, 255; Bigelow on Frauds, pp. 517, 518; Wharton on Agents & Agencies, secs. 515, 516, 524, 527; Story on Agency, secs. 300, 264; 1 Sugden on Vendors [8 Am. Ed.] pp. 357 (236), 379 (248); Chitty on Contracts [11 Am. Ed.] p. 920, and notes; Dicey on

Parties [2 Am. Ed.] 107 (91), 275 (257), 277 (259), 282 (263). (2) The defendant Fancher either was the agent of Davis when he made the contract dated March 29, 1886, or he was not such agent. If he was not such agent, then he obtained the money by fraud in representing to Winningham that he was such agent, or by Winningham's mistaken belief that he was, and the money could be recovered in an *assumpsit* for money had and received. Bigelow on Fraud, *supra*, and authorities there cited; Wharton on Agents & Agency, secs. 524–527; Story on Agency, sec. 2644, *et seq.; Ins. Co. v. Walsh, supra.* (3) Fancher assumed to have authority to contract for the sale of the entire property. Mrs. Rosannah Davis owned a one-half thereof in fee, and it is not pretended that Fancher had any power to bind her interest; hence, Winningham was justified in abandoning the sale, and in suing Fancher for the earnest money which he still retained. Mechem on Agency, secs. 541–545; *Kreger v. Pitcairn*, 101 Pa. St. 311; *Lander v. Castro*, 43 Cal. 497.

Francis W. Randolph, for respondents.

(1) Fancher having full authority from his principal to make the contract, the $200 paid on said contract became the property of Davis. The legal title to the same was vested in him and no cause of action exists in favor of Winningham against the defendants. *Bogart v. Crosby & Van Haran*, 80 Cal. 195; *Emerson v. Dooley*, 120 N. Y. Ct. of App. 540; *Whitney v. Wyman*, 101 U. S. Sup. Ct. 392; Story on Agency [Ed. 1889] secs. 261, 263; Wharton's Commentaries on Agency & Agents [Ed. 1876] sec. 517; Mechem on Agency [Ed. 1889] sec. 555; *Greely-Burnam Co. v. Capen*, 23 Mo. App. 301. (2) The question whether the vendee is entitled to the return of the deposit, or

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whether the agents are entitled to the same as commission, is to be determined in actions brought by them against the vendor; between themselves there is no liability either way. *Bogart v. Crosby & Van Haran, supra.*

Gill, J.—This controversy may be briefly stated as follows: Defendant Fancher, assuming, at least, to be the authorized agent of Davis, entered into a contract in the name of his alleged principal with plaintiff Winningham for the sale of some real estate in Kansas City, and Winningham at the time paid to Fancher, for Davis, on account of the purchase the sum of $200. When subsequently informed of the deal, Davis repudiated the sale or alleged contract, on the ground that Fancher had no authority to make it. After a somewhat protracted effort to get Davis to comply with the agreement and deed the land, the plaintiff Winningham abandoned his contract, and then demanded a return of the $200, which had all the time been held by defendant. The defendant declined to pay over the money which had been thus deposited by plaintiff, and, thereupon, this suit for money had and received was brought. On a trial by the court sitting as a jury, a finding and judgment were had in defendant's favor, and plaintiff appealed.

I. The evidence on the question as to whether or not Fancher was authorized by Davis to make the sale to Winningham was conflicting, so that the trial judge would have been justified in finding either way on that issue of fact. In favor then of the judgment below, we shall assume in what we have to say that Fancher was the duly appointed agent of Davis, and had, therefore, full authority to enter into the contract he did, and, also, to receive for Davis the money here in dispute.

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The case then is this: W. agreed with F., agent of D., for the purchase of certain real estate, and W. paid to F. (for D.) $200 on account of the purchase price. D., having repudiated the agency, refused to perform the contract, and thereupon W. disaffirmed and rescinded the same, and by this suit seeks to reclaim the deposit of $200 yet in the hands of F., the agent. On this state of facts the circuit court held that plaintiff could not recover.

In our opinion the ruling of the trial court was erroneous. We are not unmindful of the general rule, so often declared, that when one contracts merely as the known agent of another the personal responsibility of the agent will not be involved, but the principal for whom such agent was acting must be looked to. Story on Agency, sec. 261. But there is another rule which we quote from the same high authority: "If a party who has paid money to an agent for the use of his principal becomes entitled to recall it, he may upon notice to the agent recall it, provided the agent has not paid it over to his principal, and also provided no change has taken place in the situation of the agent, since the payment to him, before such notice." Story's Agency, sec. 300; *Koontz v. Bank*, 51 Mo. 277.

Now this law, when applied to the facts in the case at bar, gives plaintiff the case. Winningham lodged with Fancher the sum of $200 to be paid to Davis as part of the purchase price of the land. Davis refused to be bound by the contract of sale and declined to make the deed. Thereupon Winningham became entitled to rescind the contract and recall his deposit. 2 Chitty on Contracts [11 Ed.] 920–1. The agent Fancher had not delivered the money over to Davis, and made no showing whatever of any right on his own account to said money or any part thereof. The contract once existing between Winningham and Davis *had on* account of the

fault of Davis been abandoned, and at the institution of this suit it stood for naught—just as if no such agreement had ever been made. Under such circumstances the plaintiff had a right to demand the return of the money paid. When the contract became null and void (because of an exercise of the right of election resting with Winningham on Davis' default) the title to the money in the hands of Fancher became *ipso facto* vested in the plaintiff. Defendant then and now holds this money as the property of this plaintiff, which in equity and good conscience defendant ought to return to plaintiff.

Lord MANSFIELD has well said that this action for money had and received "will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund." *Cary v. Curtis*, 3 How. (U. S.) 246–7.

This is not a suit against an agent on a contract of his principal. That contract which was once in existence between the plaintiff and Davis was, for the fault of said Davis, abrogated and abandoned; and when it was thus rescinded the condition of matters was such that Fancher had in his possession $200 of plaintiff's money, and for the holding and retention of which there was no consideration whatever.

This money must, after rescission of the land contract, belong to *some one*. The *agent* clearly was not entitled. He claimed to hold it as the property of another—Davis. *Davis* had no right to it, for he could only claim it through the land sale to Winningham, and that contract he, Davis, ignored; and because of his (Davis') refusal to perform it Winningham elected to and did effectually abandon and rescind said contract. The money in controversy was after the rescission manifestly the property of plaintiff.'

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We have examined some authorities that would seem, at first blush, to sustain the defense. But on a close examination there is found little difficulty in avoiding any substantial conflict. For example, some of the cases, somewhat similar, have decided against holding the agent on the ground suggested in this quotation from Wharton on Agency, section 517: "The agent must be loyal to his principal, accounting to him alone; and this rule applies to all cases in which the agent holds a particular fund for a particular principal, *provided the case be one in which the principal could recover from the agent.*" (The italics are ours.) Now the latter clause is particularly pertinent in this case. Here the principal (Davis) could not recover from the agent Fancher. Davis openly and unequivocally repudiated the contract and refused to have anything to do with the deposit, and when he so refused plaintiff put an end to the contract by rescinding and revoking the entire agreement, as he had a clear right to do.

Judgment reversed and cause remanded. All concur.

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THE STATE OF MISSOURI *ex rel.* ADDIE ROGERS, Respondent, v. GAGE BROS. & CO., Appellants.

Kansas City Court of Appeals, May 16, 1892, and January 16, 1893.

ON MOTION TO AFFIRM.

1. **Appeals:** FILING TRANSCRIPT: DUTY OF CLERK: STATUTE: ORDER OF JUDGE. By amendment to section 2252, Revised Statutes, 1889 (Laws 1891, 69), after an appellant directs the clerk to make out a perfect transcript, he can wait notice from the clerk that the transcript is completed, and until such notice he is not in default, nor does it affect the matter that the court in granting an extension of time to file bill of exceptions added to the order: "But this extension in nowise to extend time for filing transcript."

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ON MERITS.

2. **Practice, Trial:** AMENDMENT: CONTINUANCE: WAIVER: DISCRETION. An amendment that is merely formal and does not change substantially the cause of action can be made at any stage of the trial, and does not afford a ground for a continuance, and the discretion of the trial court will not be interfered with unless it has been oppressively exercised; and where the amendment is answered and the trial proceeds the objection is waived.

3. **Verdict:** JURORS: IMPEACHMENT OF: POLLING OF. Considerations of public policy forbid that jurors should be heard to impeach their verdicts by showing their mistakes or misconduct; and their verdict, whether polled or not, cannot, as a general rule, be subsequently impeached by their affidavits.

4. **Witnesses:** EXPERTS: WAIVER. Where appellants objected to the testimony of certain witnesses because they were not qualified as experts, and other witnesses of like qualifications were called without objection, the objection is deemed to be waived.

5. **Evidence:** COUNSEL FEES IN ATTACHMENT: NOTES. In an action on an attachment bond the plaintiff may give in evidence the notes she had given for counsel fees in the attachment suit, which, though not conclusive, are admissible along with other evidence.

6. **Attachment:** DAMAGES: COUNSEL FEES: INSTRUCTION. In an action on an attachment bond an instruction which tells the jury that as an element of damages relator was entitled to recover such reasonable sum as the evidence showed she had paid for attorney's fees, is proper.

7. ———: ———: ———: ———. In an action on an attachment bond the measure of damages is the value of the goods at the time of the seizure with interest at the rate of six per cent. to the time of the trial.

8. **Practice, Appellate:** INSTRUCTION: HARMLESS ERROR: DE MINIMIS. An appellant cannot complain of an error beneficial to him and prejudicial to respondent. The maxim *de minimis* applied.

9. **Instructions:** COVERED IN OTHERS: HARMLESS ERROR. It is not error to refuse an instruction covering the same ground as others given, and to refuse instructions which might have been given is not reversible, when no harm follows.

10. **Verdict:** EVIDENCE. The verdict in this case is *held* not to be the result of passion, etc.

11. **Attachment:** ACTION ON BOND. Where an appeal from the judgment on the plea in abatement in an attachment suit is dismissed, an action may be instituted on the attachment bond.

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Appeal from the Bates Circuit Court.—Hon. James H. Lay, Judge.

Affirmed.

Parkinson & Graves, for appellants.

(1) Upon the amendment of the petition in this cause, a continuance should have been granted the defendants. Petition in abstract of record, pp. 2, 3; affidavit in abstract of record, pp. 5, 6; *Lumkin v. Collier*, 69 Mo. 170; *Parker v. Rhodes*, 79 Mo. 88; *Scovill v. Glasner*, 79 Mo. 449. (2) The verdict in this case is not the verdict actually agreed upon by the jury as is shown by their affidavit in support of the motion for new trial. *Dalrymple v. Williams*, 63 N. Y. 361; *Noah v. Dickerson*, 15 Johns. 309; *Thomas v. Chapman*, 45 Barb. 98; *Jackson v. Dickerson*, 15 Johns. 317; *Johnson v. Davenport*, 3 J. J. Marsh. 390; *Hix v. Drury*, 5 Pick. 296; *Taylor v. Greeley*, 3 Green, 204; *Knight v. Freeport*, 13 Mars. 218; *Perkins v. Knight*, 2 N. H. 474. (3) The testimony of Mrs. Cora Walton, Mrs. Dr. Christy and the other lady witnesses following them was improperly admitted, and was extremely prejudicial to defendants. (4) The court improperly admitted in evidence the notes given by Addie Rogers to her attorneys for the trial of the plea in abatement. (5) She was not entitled to anything except a reasonable sum for attorney's fee, it matters not what she had been compelled to pay or contracted to pay. This clause is misleading and susceptible of two constructions and should not have been given. *Legg v. Johnson*, 23 Mo. App. 590; *Cummings v. Burleson*, 78 Ill. 281; *Spring v. Collector*, 78 Ill. 101. (6) Relator's instruction number 1, wherein the jury is directed to compute interest from March 12,

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1891, up to the date of trial, is erroneous in this particular, and is not founded upon the evidence in the case. *Bosse v. Thomas*, 7 Mo. App. 590; *State v. Hecox*, 83 Mo. 531; *Raysdon v. Trumbo*, 52 Mo. 35; *Givens v. Van Studdiford*, 4 Mo. App. 499; *White v. Chaney*, 20 Mo. App. 389; *Wills v. Zallee*, 59 Mo. 509.

Francisco Bros., *W. L. Jarrott* and *W. G. Rose*, for respondent.

(1) The amendment to the petition was immaterial, only involving a matter of description not of substance, no new parties being brought in, nor the object of the suit changed. The condition of the bond was copied in the first petition, and a copy of the bond attached, so that defendants could not have been surprised. *State v. Sayers*, 58 Mo. 585; *Bartholow v. Campbell*, 56 Mo. 117. (2) By answering the amended petition, defendants waived objections to amendments. *Scovill v. Glasner*, 79 Mo. 449–454. (3) Three members of the jury, after the jury were discharged, ought not to have been allowed to impeach the verdict by their affidavit. *Pratt v. Coffman*, 33 Mo. 71; *State v. Coupenhaver*, 39 Mo. 430; *Sawyer v. Railroad*, 37 Mo. 241; *McFarland v. Bellows*, 49 Mo. 311; *State v. Underwood*, 57 Mo. 40; *State v. Branstetter*, 65 Mo. 149; *State v. Fox*, 79 Mo. 109; *Miller v. Railroad*, 5 Mo. App. 471–476. (4) Mrs. Walton, Mrs. Christy and the other ladies whose testimony is complained of fully qualified themselves. (5) To prove the notes actually given for $350, and to show that this was reasonable, was the proper way to prove the attorney fee. No money need actually have been paid. *State v. Keevill*, 17 Mo. App. 144–147; *Holthaus v. Hart*, 9 Mo. App. 1; *Wash v. Lackland*, 8 Mo. App. 122; *Brownlee*

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v. Fenwick, 103 Mo. 420; *State ex rel. v. Shobe*, 23 Mo. App. 474. (6) Section 4 of instruction number 1 is very plainly worded, and is so explained in instruction number 7 as not to leave a shadow of doubt. (7) This suit was brought March 12, 1891, and the bringing of the suit was a sufficient demand to cause interest to begin to run. *Berner v. Bagnell*, 20 Mo. App. 543. (8) But no demand was necessary. Relator was entitled to interest from the time of the taking under the attachment writ, December 14, 1889, and limiting her to interest from March 12, 1891, was an injury to her, and certainly ought not to be complained of by defendants. *Spencer v. Vance*, 57 Mo. 427; *Polk's Adm'r v. Allen*, 19 Mo. 467; *Watson v. Harmon*, 85 Mo. 443; *State to use v. Smith*, 31 Mo. 566. (9) The substance of instruction number 17 was fully embodied in instructions numbers 2, 8 and 10 given by the court.

ON MOTION TO AFFIRM.

Ellison, J.—We are asked to affirm the judgment in this cause. The appeal was taken on November 19, 1891, and time for filing bill of exceptions was extended to February 5, 1892.

Before this time expired another extension to February 15 was granted. The bill was filed within this time, and the cause was, therefore, returnable to the March term of this court. But the clerk of the circuit court did not get the transcript made out in time to reach this court for the March term; and he did not, of course, notify appellants or appellants' counsel of record of the completion of the transcript. By an amendment to section 2252, Revised Statutes, 1889, "the failure of the clerk to notify appellant or his attorney of record of the completion of the transcript in time to enable him to have same filed in the appel-

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late court in the time required by law," shall be considered good cause for refusing to affirm the judgment of the lower court. Laws, 1891, p. 69.

Our interpretation of this section, as thus amended, is that, after an appellant directs the clerk to make out a perfect transcript he can await a notice from the clerk that the transcript is completed, and until such notice he is not in default.

II. At the time of the second extension the court added to the order the following words: "But this extension in nowise to extend time for filing transcript in the Kansas City Court of Appeals." We are unable to perceive how this order can alter the duty of the clerk, or affect the party entitled to a performance of such duty, and to rely upon its performance. The motion to affirm is overruled. All concur.

ON MERITS.

SMITH, P. J.—This is an action on an attachment bond. The relator had judgment, and the defendants appeal.

The first ground of the defendants' appeal is, that the trial court erred in refusing a continuance of the cause on their motion. It appears from the record that after the jury had been sworn to try the case the relator asked and was granted leave to amend her petition. The relator's petition alleged that Gage Bros. & Co. had sued her by attachment. This allegation the court permitted to be amended so as to show that the attachment suit was brought against the relator and one Belle Rogers, upon the latter of whom no service was obtained. This amendment did not change substantially the relator's cause of action. It being a mere formal one it was permissible to allow it at any stage of the case. It afforded not the slightest ground

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for continuance. It was a matter very much in the discretion of the court with which we care not to interfere, unless that discretion plainly appears from the record, as it does not, to have been unsoundly or oppressively exercised. *Bartholow v. Campbell*, 56 Mo. 117. Besides this the defendants answered the amended petition, and proceeded with the trial of the cause, and thereby waived any objection they had interposed to the amendment. *Scovill v. Glasner*, 79 Mo. 449.

The second ground of the defendants' objection to the judgment is, that the court should have set aside the verdict of the jury for the reason that three of the jurors made an affidavit to the effect that the court had, by an instruction, directed the jury to allow the defendants a credit for $135, but that "they forgot, failed and neglected to do so, and returned said gross amount of damages as their verdict." This objection cannot be upheld. Considerations of public policy forbid that jurors should be heard to impeach their verdicts by showing their mistakes or misconduct. They ought not to be permitted to declare with a view to affect their verdict an intent different from that expressed in the verdict rendered in open court. In early times severe pains and penalties were visited on them for false verdicts. *Watts v. Brains*, Croke. Eliz. 778. The rule is now well settled in this state that the courts will not receive the affidavits of jurymen to show mistakes or errors of the jurors in respect to the merits, or that they mistook the effect of their verdict or intended something different. *Pratt v. Coffman*, 33 Mo. 71; *State v. Couperhaver*, 39 Mo. 430; *Sawyer v. Railroad*, 37 Mo. 241; *McFarland v. Bellows*, 49 Mo. 311; *State v. Underwood*, 57 Mo. 40; *State v. Branstetter*, 65 Mo. 149; *State v. Fox*, 79 Mo. 109; *Miller v. Railroad*, 5 Mo. App. 471–476; *McMurdock v. Kimberline*, 23 Mo. App. 523. Either party has the right to

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have a jury polled, and, if they all answer that the verdict returned into court is theirs, or if they are not polled at all, then the verdict cannot, as a general rule, be subsequently impeached by their affidavits. We discover nothing in the facts of this case that would bring it within any possible exception to the general rule.

The defendants' further ground of appeal is, that the court permitted the witnesses, Mrs. Walton and Mrs. Christy, to testify in relation to quality, style and value of the millinery goods seized under the attachment without first showing themselves qualified to give such testimony. Possibly this objection should have been sustained by the court, but since quite a number of other ladies of like qualifications were called as witnesses, and similarly interrogated without objection, the objection urged must be deemed to have been abandoned by defendants. The testimony of the objectionable witnesses was only cumulative with that which was similar and had been received without objection.

The defendants further complain of the action of the court in permitting the relator to introduce in evidence the notes she had given for counsel fees for services rendered in the defense of the attachment suit. These notes she had not paid. There were several lawyer witnesses introduced, some of whom testified that the amount of the fee which relator had by her notes obligated herself to pay was reasonable in such a case, while others were of the opinion that it was for an amount greater than was usual in such cases. The notes were properly admissible to show the amount she was legally bound to pay. And as to whether that amount was reasonable or not was a question for the jury to determine in the light of all the evidence before them. The notes were by no means conclusive evidence as to the amount of the

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relator's damages in that respect, but still they were admissible along with the other evidence as tending to prove that part of the damages she claimed by reason of the attachment. *State v. Keevill*, 17 Mo. App. 144–147; *Holthaus v. Hart*, 9 Mo. App. 1; *Wash v. Lackland*, 8 Mo. App. 122; *Brownlee v. Fenwick*, 103 Mo. 420; *State ex rel. v. Shobe*, 23 Mo. App. 474.

The relator's first instruction very clearly and properly informed the jury that the relator as an element of damages was entitled to recover such *reasonable sum* as the evidence showed she had paid or had become liable to pay as attorneys' fees. The reasonableness of these amounts was left, as they should have been, to the jury.

The defendants further complain that the court by the relator's first instruction told the jury that if they found for her they should allow her six per cent. interest on the value of the goods taken under the attachment for March 12, 1891. Evidently the court erred as to the date intended to be stated. No doubt the date intended was that of April 30, 1891, that of bringing the suit. The court doubtless supposed that demand was necessary to entitle the relator to recover interest on the value of her goods so attached. The measure of damages in such cases is the value of the goods at the time of the seizure with interest at the rate of six per cent. to the time of the trial. This in theory of law places the injured party in the same situation he was before the trespass was committed. *Watson v. Harmon*, 85 Mo. 443; *State v. Smith*, 31 Mo. 667; *Walker v. Borland*, 21 Mo. 289; *Spencer v. Vance*, 57 Mo. 427; Revised Statutes, sec. 4430. So that the rule laid down in the instruction complained of was really beneficial to defendants and prejudicial to the relator, but if this were not so the defendants' objection finds its answer in the principle of the maxim,

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De minimis non curat lex. And what has just been said applies to and disposes of the defendants' objection to the relator's second instruction.

The defendants further complain of the action of the court in refusing its seventeenth instruction, but in this complaint we find no merit, for substantially the same ground is covered by the eighth and tenth instructions given for the defendants. The defendants' fifteenth instruction, which was both admonitory and cautionary in its character, might have been given with propriety, but we cannot discover that its refusal by the court constitutes reversible error. We must presume that "a jury of good and lawful men" understand their duty in determining the issues in any case to be just what the court declared it to be in said instruction. It is not discernible from the record that the jury were governed by a different rule in this case, and, hence, defendants were in no way prejudiced by the action of the court.

In looking at the evidence we cannot say the verdict is excessive. There is some evidence to support it, and we cannot discover that there is such a lack of evidence as to warrant the belief that it was the result of passion, partiality or prejudice.

It is finally objected that there is no final determination of the attachment proceedings, but by an examination of the answer of the defendants it will be seen that it there stands admitted that the appeal from the judgment on the issue on the plea in abatement to this court was dismissed before the present action on the attachment bond was begun. Under the provisions of the statute this was all that was necessary to entitle the relator to sue on the bond. Revised Statutes, sec. 562.

It follows that the judgment must be affirmed. All concur.

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ELIZA MOORE, Respondent, v. D. L. LINDSEY *et al.*, Appellants.

Kansas City Court of Appeals, January 16, 1893.

Mortgages: FORECLOSURE: LEGAL TITLE: MISTAKE: SUBROGATION. A mortgagee foreclosed his mortgage by sale, at which the mortgagor's son bid in the land and received a deed, though he paid nothing, and conveyed to his father who negotiated a loan and mortgaged the premises to the loan company. The company paid the mortgagee the son's bid. *Held:*—

(1) The sale and the son's conveyance did not pass the legal title to the father, but only the right to redeem from a second mortgage.

(2) Had the son paid his bid, under the facts of the case, he would have become the owner only of the equity of redemption, and the second mortgage would have become a first lien.

(3) As the mortgagor, mortgagee and the loan company all believed that the foreclosure sale and subsequent conveyance of the son had conveyed to the father the unincumbered legal title, the loan company should be subrogated to the right of the first mortgagee to the amount of the foreclosure sale, as against the second mortgagee.

(4) *Arguendo*, that subrogation proceeds on the theory that the mortgage debt is paid.

Appeal from the Polk Circuit Court.—HON. W. I. WALLACE, Judge.

REVERSED AND REMANDED *(with directions)*.

T. G. Rechow, for appellants.

(1) If the plaintiff's contention is correct then she has an adequate remedy of law and cannot maintain this bill. The point that the petition does not state facts sufficient to constitute a cause of action can

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be raised for the first time in this court. *Bateson v. Clark*, 37 Mo. 31; *State ex rel. v. Matson*, 38 Mo. 489; *Weil v. Greene Co.*, 69 Mo. 281; *Farley v. Railroad*, 72 Mo. 341; *Henry v. Bell*, 75 Mo. 194. (2) The defendant, International Loan & Trust Company, having paid the bid of W. A. Lindsey under the Emlett mortgage, and taxes at the request of Lindsey, is entitled to be subrogated to the rights of said Emlett or W. A. Lindsey to the extent of the amount paid thereon. *Allen v. Dermott*, 80 Mo. 56; *Norton v. Highleyman*, 88 Mo. 621; *Wells v. Lincoln Co.*, 80 Mo. 424; *Honoker v. Shough*, 55 Mo. 472; *Yaple v. Stephens*, 36 Kan. 680; *Fevel v. Zuber*, 67 Tex. 275; s. c., 3 S. W. Rep. 273; *Arnold v. Green*, 116 N. Y. 566; *Hammond v. Barker*, 61 N. H. 53; *Thompson v. Longan*, 42 Mo. App. 146; *Campbell v. Allen*, 38 Mo. App. 146; *Wilson v. Brown*, 13 N. J. Eq. 277; *Caudle v. Murphy*, 89 Ill. 352; *Hart v. Davidson*, 19 S. W. Rep. 454; *Matteson v. Thomas*, 41 Ill. 110.

Hamlin & Hamlin, for respondent.

(1) To the first assignment of errors it is sufficient to say that there is nothing in appellants' contention that there is no equity in respondent's bill. It certainly was a case of purely equitable jurisdiction. (2) The appellant, International Loan & Trust Company, had no interest in the land whatever to protect; the payment was purely voluntary on their part, and that, too, after they were fully advised of all the facts. It was not the intention of any of the parties to the transaction to take an assignment of the Emlett security, but on the contrary intended to pay off and satisfy said Emlett mortgage and rely entirely on the mortgage taken by themselves for security. Consequently the doctrine of subrogation does not apply;

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neither ought they to be subrogated to the rights of Emlett. *Bunn v. Lindsay*, 95 Mo. 251; *Woolbridge v. Scott*, 69 Mo. 669; *Price v. Courtney*, 87 Mo. 395; *Rogers v. Tucker*, 94 Mo. 346; *Kleimann v. Geiselmann*, 45 Mo. App. 497; *Johnson v. Goldsby*, 32 Mo. App. 564. (3) A party cannot give two mortgages on his property and then, at a sale under the first mortgage, become the purchaser, either directly or indirectly, of the same, and thereby cut out the junior mortgagee. *Plum v. Mfg. Co.*, 89 Mo. 165; 2 Jones on Mortgages [3 Ed.] sec. 1887.

SMITH, P. J.—This is a suit in equity arising out of substantially the following facts:

D. L. Lindsey executed contemporaneously two mortgages on a certain tract of land, the one to secure a note given for $1,200 to George Emlett for the purchase money for said tract of land, and the other for $1,000 to secure a debt due plaintiff. It appears directly and inferentially from the evidence that Lindsey made default in the payment of the Emlett mortgage debt when the same became due, and that he made an application to the International Loan & Trust Company, who was made a defendant in the suit for a loan on the land to enable him to pay Emlett's mortgage, but experienced some difficulty in consequence of the existence of the plaintiff's second mortgage. In order to remove this impediment the plaintiff, who was the sister of Lindsey, was asked to release her mortgage. This she declined to do. Emlett then advertised the land under his mortgage and sold the same to W. A. Lindsey, a son of the mortgagor. Nothing was paid by W. A. Lindsey on his purchase. He conveyed the land to D. L. Lindsey, the mortgagor. The latter thereupon negotiated a loan from the loan and trust company on the land for $1,200. It seems that D. L. Lindsey and

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the loan and trust company believed that the sale made of the land by Emlett to W. A. Lindsey passed the title to the latter and cut out the second mortgage of the plaintiff.

It further appears that the loan and trust company, out of the $1,200 so loaned, paid to Emlett $891.03, the amount of the bid made by W. A. Lindsey for the land, and also paid $22.39 taxes due on the land. This being done the deed was made by Emlett to W. A. Lindsey for the land, and the said D. L. Lindsey executed the mortgage to the loan and trust company on the land to secure the $1,200 loan so made. The object of the plaintiff's suit is to have her second mortgage declared a first lien on the land and the circuit court so decreed. To reverse this decree this appeal is prosecuted.

It is conceded that the Emlett mortgage was a prior lien on the land to that of plaintiff. And it might as well, too, be conceded that as between the plaintiff and the mortgagor the purchase by W. A. Lindsey at the sale made by Emlett under his mortgage did not have the effect to pass an unincumbered legal title to the land, or which is the same thing to cut out the plaintiff's second mortgage lien. *Plum v. Studebaker*, 89 Mo. 165; 2 Jones on Mortgages [3 Ed.] sec. 1887; 2 Pomeroy on Equity, sec. 728. Since W. A. Lindsey no doubt bid in the land for D. L. Lindsey to whom he undertook to convey it, and since there was nothing paid by W. A. Lindsey on his bid, nor was there anything paid by D. L. Lindsey to W. A. Lindsey as a consideration for the said conveyance by the latter to the former, we are unable to discover that the case is different than if D. L. Lindsey had himself directly bid in the land at the sale made by Emlett.

If W. A. Lindsey had bid in the land, paid the amount of his bid and had received a deed from

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Emlett, he would still not have acquired the unincumbered legal title, but would have been the owner only of an equity of redemption in the land. In that case the plaintiff's second mortgage lien would have been advanced to the place of a first mortgage. If the value of the land was in excess of the second mortgage, then to the extent of such excess would the mortgagor's equity of redemption have been enhanced, but, beyond this and the payment of the first mortgage debt for which he was bound, his position was not altered. If the land was of no greater value than the amount of the second mortgage, as seems was the case, then all that the mortgagor accomplished by his purchase was the discharge of his first mortgage debt.

This brings us face to face with what seems to us to be the paramount question in this case, that is to say, whether the loan and trust company under the agreement with the mortgagor, having paid to Emlett the amount of the bid of W. A. Lindsey for the land and the taxes thereon, is in consequence of that entitled in equity to be subrogated to the rights of Emlett, the mortgagee, and to take precedence over the second mortgage lien to the extent of the amount so paid by it. Undoubtedly Emlett, the mortgagee, supposed that in making the foreclosure sale that he was selling the fee. It is equally clear that the purchasing mortgagor supposed that it was the fee that he was purchasing. No other conclusion can be fairly drawn from the evidence. His evident purpose was to secure in himself the title in fee so that he could obtain the desired loan to pay Emlett's mortgage debt. He first endeavored to induce the plaintiff to release her mortgage, and, failing in that, a foreclosure sale was made to enable him thereby to accomplish that end. The manner in which the foreclosure sale was conducted, the execution of the mortgagee's deed to W. A.

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Lindsey, and other facts all tend to lend support to the inference that it was the intention of all the parties to the mortgage to so conduct the transaction as to enable the mortgagor to acquire the unincumbered title to the land, so that he would be enabled to procure the desired loan thereon of the loan and trust company. Not only this, but the loan and trust company supposed that the foreclosure sale had passed the fee to the mortgagor, or else it would not have made the loan that it did to him on the land. It had the land appraised, and it is to be inferred that the valuation fixed on the land was less, or, at least, not in excess of the loan; for, if so, why was a personal guaranty taken for the payment of $300 of the amount loaned?

It thus appears that these elements constitute a case of mixed and mutual mistake of law and fact. *Griffith v. Townley*, 69 Mo. 13. It manifestly would be highly inequitable to permit the plaintiff to profit so largely by this mistake. The payment by the loan and trust company of the amount bid at the foreclosure sale, according to the decree, gave it no right or interest either in the land, or the purchase money mortgage. But plaintiff's security from being of no value was thereby enhanced in value to the amount of her debt. It is true that in this view of the case the first mortgagee was paid his debt, but the loan and trust company making the payment must content itself with a second mortgage security without any value. It is thus made to appear that the case is one warranting equitable relief.

The doctrine of subrogation rests on the basis of mere equity or benevolence. It is resorted to for the purpose of doing justice between the parties. The subrogation by operation of law to the rights and interests of the mortgagor in the land is on and by redemption; and redemption is payment of the mortgage debt after

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forfeiture by the terms of the mortgage contract; so that really the subrogation by operation of law arises or proceeds on the theory that the mortgage debt is paid.

Under the equitable principle of subrogation one, who pays a mortgage debt under an agreement for an assignment or for a new mortgage for his own benefit or protection, acquires a right to the security held by the other. Jones on Mortgages, sec. 874; 1 Leading Cases in Equity, 154; *Homeopathic Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Denton v. Col.*, 30 N. J. Eq. 244; *Salyn v. Knox*, 41 Mich. 40; *Sevy v. Martin*, 48 Wis. 198; *Barnes v. Mott*, 64 N. Y. 397. So it has been adjudged that in a case where one pays the debt of another at the debtor's instance that equity will subrogate him to the rights of the creditors. *Norton v. Highleyman*, 88 Mo. 621; *Williams v. Perkins*, 83 Mo. 376; *Wilson v. Brown*, 13 N. J. Eq. 277; *Richmond v. Morrison*, 15 Ind. 134; *Hough v. Ins. Co.*, 57 Ill. 319; *Sanford v. McLow*, 3 Paige, 117; *Wolf v. Walter*, 56 Mo. 292; *Hoy v. Brambal*, 4 C. E. Greene (N. J.) 563; *Pierson v. Anderson*, 4 Edwards Ch. 17; *Pelz v. Clark*, 5 Peters (U. S.) 482; *Carter v. Taylor*, 3 Head, 30.

So too it has been held that when a purchaser at a foreclosure sale supposing he had acquired good title sold the land to another by warranty deed, the mortgagor having recovered the land on account of irregularities in the foreclosure sale, the purchaser was sued upon his covenant of warranty and was obliged to pay the value of it. But he was declared entitled to be subrogated to the rights of the mortgagor as an equitable assignee. *Gatewood v. Gatewood*, 75 Va. 407. And so too it has been further held in this state that when by reason of the irregularity in the proceedings to foreclose a mortgage the title did not pass to the purchaser at the foreclosure sale that such purchaser ought to be

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subrogated to the rights of the mortgagee by virtue of the payment of the mortgage debt, and that in such case the purchaser does not occupy the relation of stranger to the mortgage. *Hornaker v. Shough*, 55 Mo. 472; *Jones v. Mack*, 53 Mo. 147. And in another case where a sale under a mortgage failed to carry the legal title to the land it was held that it operated to vest the equitable title to the mortgage in the purchaser. *Wilcoxon v. Osborne*, 77 Mo. 621.

In view of the principles to which we have already adverted we are of the opinion that the loan and trust company is entitled to be subrogated to the rights of Emlett under his prior mortgage to the extent of the amount advanced by it in payment of the amount of the bid by W. A. Lindsey at the foreclosure sale and the taxes paid by it. It results that the decree of the circuit court will be reversed and the cause remanded with directions to order, adjudge and decree that the said International Loan & Trust Company be substituted and subrogated in said Emlett's first mortgage to his rights therein to the extent indicated in the foregoing opinion, and to make the usual order for the foreclosure of said mortgage lien and the sale of the said real estate thereunder. All concur.

ROYAL E. RUCKER, Respondent, v. D. A. HARRINGTON, Appellant.

Kansas City Court of Appeals, January 16, 1893.

1. **Frauds and Perjuries:** SALES OF REAL ESTATE: CONTENTS OF CONTRACT. Whether an agreement for the sale of real estate be witnessed by a formal contract, or by a memorandum, in either case the paper must, under the statute, contain the whole agreement. And, *held, arguendo,* that the seller or buyer of the land cannot be filled in by parol, nor one piece of property be inserted for another. The Missouri cases are discussed and distinguished.

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2. ——: ——: SUBSEQUENT ORAL CONTRACT. A contract for the sale of lands cannot be varied by a subsequent oral agreement, as that the buyer agreed to take a less perfect title than that called for in the contract in consideration of an earlier giving possession than originally agreed.

3. ——: ——: SUBSTITUTED PERFORMANCE. There may be an executed performance substituted instead of the performance required in the contract, if it be accepted and accomplished, but a verbal agreement for substituted performance of a written contract for the sale of real estate cannot be enforced for the same reason that an oral contract, or a subsequent oral modification of a written contract, cannot be enforced.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

REVERSED.

THIS action is for damages for defendant's alleged breach of contract, and is founded on the following written agreement for the sale of lands and a subsequent verbal agreement in relation to the same sale:

"This contract, made and entered into this third day of April, 1890, by and between Royal E. Rucker, of the county of Jackson, state of Missouri, the seller, and D. A. Harrington, of the county of Jackson, state of Missouri, the buyer,

"Witnesseth: The seller has bargained and sold to the buyer the following described real estate situated in the county of Jackson, state of Missouri, to-wit: The northwest quarter of the southwest quarter, and the northeast quarter of the southwest quarter, and fifteen and one-third acres off of the north end of the southeast quarter of the southwest quarter of section twenty-one (21), township forty-eight (48), range thirty-two (32), containing ninety-five and one-third acres. The seller is to retain possession of the farm until January 1, 1891, and for the use thereof is to pay the buyer one-third of the corn cribbed and one-

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third of the small grain in the stack, the buyer to have privilege of making such improvement as he wishes that does not interfere with the seller in farming. At and for the price of $4,290, to be paid as follows: $100 at the signing of the contract, the receipt of which is hereby acknowledged by the seller, and which is deposited with Harper and Wilson as part of the consideration of the sale, and the balance whereof is to be payable in the following manner, to-wit: The buyer to assume a note of $1,600 and interest, which is secured by deed of trust on the land, and pay the balance in cash at the time deeds are passed. The seller is to furnish, within ten days from date hereof, a complete abstract of title to said property from government down to date, and such usual certificates as may be required by the buyer as to judgments and mechanics' liens from the various courts in which judgments would be liens thereon, and the buyer to have ten days for the examination thereof.

"The seller also agrees to pay all state, county, municipal and special taxes now a lien on said property, excepting all taxes for the year of 1890 and thereafter, which are to be assumed and paid by the buyer. If upon examination it is found that the seller has a good title in fee to said property, he agrees to execute and deliver to the buyer or order a general warranty deed thereto, properly executed and free and clear of all liens and incumbrances whatsoever, except only such as are to be assumed by the buyer hereunder and concurrently herewith and as a part of the same transaction; the buyer is to pay the balance.

"If the title is found to be defective, the seller agrees to have the defects in it rectified within a reasonable time, which is not to exceed thirty days from the date of which the transfer of the property is to be consummated under this contract; but in case such

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defect in the title cannot be cured or remedied within that period, and no extension of time is had between the parties, this contract is to be null and void, and the said sum of $100 deposited as aforesaid is to be returned to the buyer.

"If, though the title be good and the seller has kept his part of the contract, the buyer fail to comply with its requirements on his part within ten days after being furnished with the abstract of title, then the aforesaid deposit of $100 shall be forfeited to the seller, but for this cause this contract shall not cease to be operative as between the parties hereto.

"Time is and shall be the essence of this contract, and the sale and transfer of said property according to the provisions hereof shall be consummated within the time specified above."

On its afterwards being ascertained that plaintiff had not a good marketable or paper title, the following further oral agreement was (as plaintiff charges) made between the parties: "And it was agreed in regard to this defect, between plaintiff and defendant, that in consideration of the plaintiff deducting $300 from the purchase price of said property as agreed on in said contract, and also agreeing to deliver possession of said property to defendant on the first day of November, 1890, instead of the first day of January, 1891, as agreed in said contract, the defendant would waive said defect in the title and accept said title as satisfactory. And thereafter the plaintiff offered to carry out and complete said contract, and deliver to defendant a deed as therein required, and has repeatedly demanded of the defendant that the same be consummated, but the defendant has failed and refused and still refuses to carry out said contract on his part, and has notified plaintiff that he would not carry it out."

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The court below found for plaintiff and assessed his damages. Defendant appeals.

Wash Adams, for appellant.

(1) The effect of the statute of frauds is to prevent specific enforcement of any verbal agreement affecting the title to land and the allowance of damages for its breach. *Millentryer v. Morrison*, 39 Mo. 71; *Brungirdle v. Heald*, 1 B. & Ald. 727; *Touch v. Strawbridge*, 2 C. B. 814; *Bretain v. Roeseter*, 11 Q. B. Div. 123; *Craig v. Vanpalt*, 3 J. J. Marsh. 489; *Haynes v. Nice*, 100 Mass. 327. (2) A written contract may be varied, waived or discharged by a subsequent parol agreement provided such agreement is not invalid under the statute of frauds, or otherwise. 1 Phillips on Evidence [Ed. 1823] p. 493; Browne on the Statute of Frauds [3 Ed.] sec. 409; Stephens' Digest Law of Evidence, art. 90, p. 163, subdiv. 4. (3) When a written contract is subsequently altered by a verbal agreement, the original written agreement is abandoned except so far as the same constitutes a part of the modified contract. The real contract in such case depends upon the verbal agreement. *Dana v. Hancock*, 30 Vt. 616; *Lanitz v. King*, 93 Mo. 213. No action can be maintained upon an agreement embraced within the provisions of the statute of frauds, unless it is wholly in writing. *Goss v. Nugent*, 2 Nev. & Man. 33, 34; *Harvey v. Graham*, 5 Adol. & Ell. 61–73; *Stead v. Donber*, 10 Adol. & Ell. 57; *Noble v. Wood*, L. R. 1 Exch. 117; *Marshall v. Lynn*, 6 Mees. & W. 109; *Stowell v. Robinson*, 3 Bing. (N. C.) 928; 5 Sutt. 196; *Dana v. Hancock*, 30 Vt. 616; *Parteriche v. Poulet*, 2 Atk. 384; *Emmet v. Dewhurst*, 3 McM. & G. 587; *Mitchell v. Ins. Co.*, 54 Ga. 290; *Mathison v. Wilson*, 87 Ill. 52; *Cook v. Bell*, 18 Mich. 387; *Abell v. Munson*, 18 Mich. 306; *Brown v. Sanborn*,

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21 Minn. 402; *Long v. Hartwell*, 5 Vroom, 124; *Huffman v. Hummer*, 3 C. E. Green, 89; *Cravener v. Bowser*, 4 Pa. St. 262; *Brown v. Everhard*, 52 Wis. 205; *Clark v. Russell*, 3 Dallas, 415; *Swain v. Seamens*, 9 Wall. 272; *Emerson v. Slater*, 22 How. 42; *Hickman v. Haynes*, L. R. 10 C. P. 605; *Espy v. Anderson*, 14 Pa. St. 308; *Sanderson v. Graves*, L. R. 10 Exch. 236; *Goucher v. Martin*, 9 Watts, 106; *Dial v. Crain*, 10 Tex. 454; *Schultz v. Bradley*, 57 N. Y. 646; *Hasbrouch v. Tappan*, 15 Johns. 202; *Robson v. Collins*, 7 Ves. 130; *Nurse v. Seymour*, 13 Beav. 254; *Hill v. Blake*, 97 N. Y. 52; Wood on Statute of Frauds, sec. 388, p. 867; *Cummings v. Arnold*, 3 Metc. (Mass.) 489; 1 Phillips on Evidence [Ed. 1823] p. 493; Rice on Evidence [Ed. 1892] p. 1261; *Lippold v. Held*, 58 Mo. 213.

Ed. G. Taylor, for respondent.

(1) Waiver by the defendant of a condition of the contract in his favor is not a modification, but a performance of the contract on the part of plaintiff. *Ins. Co. v. Kyle*, 11 Mo. 278; *Russell v. Ins. Co.*, 55 Mo. 585; *Smith v. Haley*, 41 Mo. App. 611, 619; Browne on Statute of Frauds, sec. 425; *Blood v. Hurly*, 15 Me. 61; Bishop on Contracts [Enlarged Ed.] secs. 771, 796; *Barton v. Gray*, 57 Mich. 623; 7 Wait's Actions & Defenses, 429. (2) In this state, the statute of frauds does not require the terms of the contract for the sale of land to be in writing; but, if the note shows only "that A agrees to sell to B a piece of land in fee," the statute is satisfied. *Bean v. Valle*, 22 Mo. 126; *Halsa v. Halsa*, 8 Mo. 303; *Ivory v. Murphy*, 36 Mo. 534; *O'Neil v. Crane*, 67 Mo. 250; *Briggs v. Munchon*, 56 Mo. 467; *Lash v. Parlin*, 78 Mo. 391; *Ellis v. Bray*, 79 Mo. 227; *Rollins v. Claybrook*, 22 Mo. 405. (3) Therefore, even if there was a parol modification

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of the contract, the plaintiff suing on the contract as modified would prove it partly by the original and partly by the after parol agreement, the original still remaining as evidence of the fact of a sale having been made, containing the names of the parties and description of the property. *Cummings v. Arnold*, 3 Metc. 486; *Stearns v. Hall*, 9 Cush. 31; Bishop on Contracts [Enlarged Ed.] sec. 771; *Hugley Bros. Ass'n v. Smith*, 18 S. W. Rep. (Tex.) 955.

ELLISON, J.—The question presented by this record is of much importance. It is apparent that the plaintiff's rights are to be measured by the written contract as modified or altered by the subsequent verbal contract; that is, the two contracts form the foundation upon which his claim is built. *Lanitz v. King*, 93 Mo. 513. He cannot stand upon the written contract alone, for his case concedes that he could not comply with it. He cannot stand upon the oral contract (without reference to its validity) unaided by the written contract, for that is but a part of the whole contract and connects itself with the greater part of the written contract. His case then is bottomed on a contract for the sale of lands which is partly written and partly verbal. It is a rule in the common law of evidence that, since all antecedent or contemporaneous propositions or agreements are deemed to be merged into the written contract, no evidence of prior or contemporaneous arrangements, which varies, adds to or takes from the writing, can be received. But the written contract can be varied, added to or subtracted from by *subsequent* agreements. These well-recognized general rules of law are not controverted by counsel. But the question before us involves the proper construction of the statute of frauds and its bearing on the rules mentioned. That statute declares that no action shall be

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brought upon any contract for the sale of lands, "unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized." If the contract is complete and in writing and no attempt is afterwards made to vary its provisions, there is nothing left for the courts but to enforce those provisions if otherwise lawful, and such is the rule regardless of the statute of frauds. But, where there has been subsequent verbal change or modification of some of the provisions of the completed contract, whether evidence of such change can be heard; or, where only a memorandum of the contract is made, what it shall contain, are questions which have brought about much discussion. The great weight of authority favors the proposition that subsequent verbal changes or modifications are not allowed to affect the original writing. *Goss v. Nugent*, 5 Barn. & Ad. 58; *Harvey v. Graham*, 5 Adol. & Ell. 61; *Marshall v. Lynn*, 6 Mees. & W. 109; *Hickman v. Haynes*, L. R. 10 C. P. 605; *Sanderson v. Graves*, L. R. 10 Exch. 236; *Emerson v. Slater*, 22 How. 42; *Dana v. Hancock*, 30 Vt. 616, and authorities hereinafter mentioned. And this is said to be true without regard to whether the oral agreement relates to those things which, standing apart, would not be affected by the statute of frauds. *Harvey v. Graham*, and *Dana v. Hancock*, *supra*.

Plaintiff seeks to fortify himself by undertaking to show in substance that a memorandum of the contract need not mention all the agreement between the parties, and that those portions not mentioned may be shown by oral testimony. And that, therefore, if the contract is completely written out in technical form, it may be varied or changed by subsequent oral agreement, without doing violence to the statute, since it

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was not necessary, in the first instance, that all the agreement made should have been in the writing. I will examine this position in the light of the reason back of the statute and the authorities construing its terms. The great weight of authority as well as strong reason also maintains that, where there is only a memorandum of the contract, such memorandum must make note of all the agreement had at the time, including the terms. The statute declares that the formal contract itself, or a note or memorandum of such contract, must be in writing. This memorandum must be a memorandum of the contract, that is to say, all of the contract or terms of the agreement, and not of a part of it. Benjamin on Sales, secs. 210, 222; Story on Sales, secs. 269, 271; *Riley v. Farnsworth*, 116 Mass. 223; *Elliott v. Barrett*, 144 Mass. 256; *Oakman v. Rogers*, 120 Mass. 214; *Peltier v. Collins*, 3 Wend. 459; *Barley v. Ogden*, 3 Johns. 419; *Waterman v. Meigs*, 4 Cush. 497; *O'Donnell v. Leeman*, 43 Me. 158; *Grafton v. Cummings*, 99 U. S. 100; *Williams v. Morris*, 95 U. S. 444, 456; *North v. Mendell*, 73 Ga. 400; *Lee v. Hill*, 66 Ind. 474; *Wood v. Davis*, 82 Ill. 313; *Broadman v. Spooner*, 13 Allen, 353.

I ought to state here that the courts in a large number of the states in America hold that the consideration need not be noted down in the memorandum, but they base such holding not on the theory that the memorandum need not note all the essential terms of the agreement as made, but that the consideration is not considered by such courts as a part of the agreement as contemplated by the statute. Perhaps the leading case in the United States of the class here referred to is *Packard v. Richardson*, 17 Mass. 122. Yet in that state, as shown by the foregoing citations, it is held that *all* the agreement made by the parties must appear in the memorandum. And so it is likewise held in all the states

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entertaining the foregoing view as to its being unnecessary to state the consideration.

But it is argued that, in Missouri, a looser construction of this statute has obtained from the first. Let us see what there is in this. Judge McGirk declared in *Bean v. Valle*, 2 Mo. 126, that a note or memorandum is something less than a formal contract in detail, and that if the memorandum only says: "Witness that A agrees to sell to B a piece of land in fee, and A should sign this, I hold the statute is satisfied as to A." The judge, of course, had it in mind that the land should be identified by some sort of description. The point of decision in that case was that it was not necessary to state the consideration, and that is all which is decided. The memorandum of contract put by the learned judge, by way of illustration, may well be made, since we in this state hold with *Packard v. Richardson*, 17 Mass. 122, and other American authorities, that the consideration is not a part of the agreement; for the illustration states a complete contract, as in such contract there is implied that there shall be a warranty deed, made and delivered in a reasonable time, conveying a good marketable title in fee. *Herryford v. Turner*, 67 Mo. 296; *Mastin v. Grimes*, 88 Mo. 490.

The case of *Halsa v. Halsa*, 8 Mo. 303, was where a contract of sale by the general government was assigned without stating the consideration of the assignment, and merely decides that the consideration need not be in the writing. The case of *O'Neil v. Crane*, 67 Mo. 250, was a mercantile transaction for a sale of chattels, and only involves a question of consideration. The cases of *Ellis v. Bray*, 79 Mo. 227, and *Ivory v. Murphy*, 36 Mo. 534, likewise involved only the question of stating the consideration. The case of *Lash v. Parlin*, 78 Mo. 391, has no application to the point

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here. The memorandum in that case showed the agreement "exactly as made." The question of the competency of oral testimony to show agency and the surrounding circumstances at the time the contract was made is not disputed anywhere, and is not involved here. Substantially the same remarks will dispose of the case of *Briggs v. Munchon*, 56 Mo. 467. Some expressions in the foregoing cases are general and were perhaps influenced by the thought of a rule of evidence disassociated from the rule under the statute of frauds. That this is probably true can be inferred from some authorities which are cited in these cases. Thus, the cases of *Rollins v. Claybrook*, 22 Mo. 405, and *Moss v. Greene*, 41 Mo. 389, are cited, when neither of them arose under the statute. In the former earnest money was paid, thus placing the case outside the statute; and the latter was an ordinary contract in writing upon which the statute has no bearing. These cases only refer to the common-law rule of evidence which allows parol testimony to aid a written contract which shows upon its face that it does not contain all of the agreement made by the parties. They have no relation whatever to the statute of frauds. Additional terms to an apparently incomplete contract may, as hereinbefore stated, under the common law be shown by parol, for under the common law it was not necessary that the contract should be in writing; while under the statute the contract must be witnessed by writing. The distinction is plain.

So, I assume that it could not have been meant by any of the general remarks in the foregoing Missouri cases that you could aid the writing by parol testimony of things omitted which are *essential*, under the statute, to be put in writing.

For instance, it is essential to put in the writing that, whereby the seller and buyer may be ascertained

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(Story on Sales, sec. 266), and also a description, or at least data, whereby the property may be identified, and oral testimony would not be permitted to fill in the land or to supply a buyer or seller. Nor, for the same reason, as we shall presently see, could oral testimony be allowed to subsequently change or alter anything which was put in the written contract or memorandum which was essential, under the statute, to be therein incorporated. For instance, if certain lands were described, it would not be permissible to show that afterwards other and different lands were verbally agreed to be inserted in place of those described. If these things can be done, it must be apparent that the statute enacted for the declared and historically notorious purpose of preventing fraud and perjury is a sham. While I use the foregoing instances as illustrations, I do so merely for illustration, not that they are the only essentials, for, as before stated, *all* (at least all of substance) of the terms of the agreement are essentials to the memorandum of that agreement and must be noted in writing. To make a memorandum of an agreement, as before stated, is not to make a memorandum of a part of an agreement. It may be altogether informal; it may include technical terms requiring parol explanation, and in commercial matters, as stated by one of the English cases above cited, it may consist of a sort of mercantile short-hand, yet it must show the agreement. Of course things may be implied to aid a memorandum just as they would to a formal contract; for instance, if no time of delivery be agreed upon and, therefore, not appearing in the memorandum, a reasonable time would be implied. The memorandum may be exceedingly limited, as in the illustration given in *Bean v. Valle, supra*, provided it correspond with the agreement and contains the elements of a contract.

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We are, however, not left to stand alone on the foregoing analysis of the decisions of our supreme court. The view of the law which we have taken in the course of this opinion is amply supported in the case of *Smith v. Shell,* 82 Mo. 215, wherein it is held that the memorandum must show all that was agreed upon except consideration. That case does not refer to the former decisions of the same court, to which we have referred; but the face of the opinion, as delivered by HENRY, J., shows that it was thoroughly considered. While that case is stated by the editors of the American & English Encyclopedia of Law to have overruled the cases we have discussed, yet it is quite probable that the distinguished judge and those of his associates who concurred with him, regarded (as we have) only the points of decision in those cases, disconnected from the general remarks therein made. So regarded, the cases are not in conflict. However this may be, the latter case supports the construction which we have given the statute. That view is so well fortified in reason and authority that we advance it with confidence. It is not only upheld in the cases to which we have referred, and which will be found in the brief of defendant's counsel, but by many others which an examination of the question has thrown in our way, as well as by such eminent authors as Story in his work on sales, sections 257, *et seq.*, 265, 266, 269, 270; Benjamin on Sales, 201–213, 234; Browne on Statute of Frauds; 2 Reed on Statute of Frauds, section. 454; 2 Rice on Evidence, 1261; 1 Phillips on Evidence, 493.

Having, therefore, established or shown, that whether the agreement be witnessed by a formal contract, or only a memorandum, in either case the paper must, under the statute, contain the whole agreement, we will now consider whether such memorandum can be varied by a subsequent oral contract. It seems to me

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that such question is practically answered in the foregoing consideration of what it is necessary for the memorandum to contain. It is true that at common law, while you could not vary the terms of a written contract by prior or contemporaneous agreements or stipulations, yet you might do so, on sufficient consideration, by *subsequent* oral agreement. But in such case the original agreement, as has been already stated, need not have been in writing; the rule is one of evidence, and there being no inhibition against making the whole contract orally, there can be no reason to prevent subsequent oral change; but in a case under the statute an entire different phase is presented. It should be apparent that if the original contract must be in writing, to be capable of enforcement, any subsequent change therein must likewise be in writing. It is difficult to find argument to sustain this proposition, simply from the fact that it is self-evident. It will not do to say that the statute only has reference to or prohibits an entire new deal or change of contract, for we have already seen that the entire contract, substantially as made, is within the terms of the statute. And, as applied to this case, it must be admitted that the original contract could never have been enforced by plaintiff, since he did not have the title he therein agreed to convey. He is thus compelled to sustain his cause of action by the subsequent oral contract, the subject-matter of which oral contract is found in the original writing, while the *contract itself* is found in the subsequent oral agreement, connecting itself with the writing for a part of its terms. To enforce such a contract would be to practically nullify the statute.

II. Plaintiff, however, insists that the oral agreement in the case at bar was not a change of the contract, but was a substituted performance, and that performance

of the contract, as distinguished from the contract itself, is not within the statute. I am quite willing to concede that there may be a substituted performance, *performed—executed.* As, if the contract should call for a warranty deed to be delivered on the first day of January, and a quitclaim deed should be delivered on the fifteenth of January *and accepted* in discharge of the contract. So, the contract may be discharged by accord and satisfaction, and the like. But this is a wholly different consideration from matters executory.

Plaintiff's contention is supported by only one case to which our attention has been called, *Cummings v. Arnold*, 3 Metc. 486. That case, as decided, is analogous, in principle, to plaintiff's case here; but the reasoning of the judge therein is not so. He relies principally on the case of *Cuff v. Penn*, 1 M. & S. 21. He declares that the principle upon which that case rests "is, in our judgment, more satisfactory, and better adapted to the administration of justice in this and similar cases." In our view, the *Cummings case* does not touch the principle of *Cuff v. Penn*, and it can find no support whatever from the latter. In *Cuff v. Penn* there was a written contract for the delivery of bacon to Penn in stated amounts, and at stated times from April 20 to August 10, at stated prices. After several deliveries had been accepted, the defendant on the second day of July "*called on the plaintiffs and told them, as the sale of bacon was very dull, he hoped that they would not press it on him, and they assured him that they would not.*" Plaintiffs, having complied with this request for some time, at length informed the defendant that he had exceeded a reasonable time, and requested him to name a time for delivery. Defendant declined, observing that sales were still very dull. Similar requests were made to defendant to say when he would take the bacon, without effect. Finally, he

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repudiated the contract, and when sued objected in defense that, if the oral agreement was to be taken as making a new contract, it was not good under the statute of frauds. Lord Ellenborough very properly stated the statute of frauds *not to be applicable at all*, since the provisions of the statute were complied with, in that the contract was in writing, and had been partly performed. But even the remaining part of the opinion, concerning the variations of a written contract, under the rules of evidence, does not aid the *Cummings case;* for the substituted delivery was had at the defendant's special request, and solely for his accommodation, the plaintiff never being in default. The just principle of estoppel *in pais* finds a place in such state of case.

But, in addition to this, the view of that case, as given in the *Cummings case*, has been overruled in England. *Stead v. Dawber*, 2 P. & D. 447; *Marshall v. Lynn*, 6 M. & W. 109. It is, however, worthy of remark, as quite singular, that the courts in the cases last cited should have thought *Cuff v. Penn* to be a decision on the statute of frauds and, therefore, necessary to be overruled, when, as before remarked, it does not discuss or construe the statute. And, if it did, the case was nothing more than a voluntary extension of time for delivery made at the request of the defendant. The case did not show a *contract* to change or enlarge performance, but merely forbearance at request and for the accommodation of the opposite party. In which instance he should, of course, be estopped from setting up a voluntary compliance or acquiescence in his own request. Such is evidently the view taken in the late cases of *Hickman v. Haynes*, L. R. 10 C. B. 598; *Ogle v. Lord Vane*, 2 Q. B. 275; *Tyers v. Rosedale*, L. R. 10 Ex. 195, though the opinions do not refer, in terms, to *Cuff v. Penn*. It is, therefore, it seems to me,

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quite clear that when the Massachusetts court in the *Cummings case* took the case of *Cuff v. Penn* for its base it builded on sand. The learned judge in the *Cummings case* dwells upon substituted performance as distinguished from the contract, and as a thing apart. But he seems not to distinguish between substituted performance, accomplished—accepted, and substituted performance, unaccomplished and unaccepted—resting merely, on agreement. And so we conceive plaintiff's counsel, in the case at bar, has fallen into the same error. An error he would doubtless have avoided but for that case. That case, so far as I have been able to learn from the research of counsel and my own investigation is not supported by any adjudications before or since; it is criticised in 22 Howard, 42, *supra.* If an unexecuted verbal agreement for substituted performance of a written contract for the sale of lands may be enforced, the statute of frauds is of no further practical importance. What is substituted performance? It is substituting something else in the place of what was agreed to be done in the writing. And, if an unexecuted oral agreement to do this is binding, other land, on other conditions, terms and stipulations, may be orally agreed to be substituted in performance or satisfaction of the writing. This would be juggling with the statute. The Massachusetts court, after quoting from Lord ELLENBOROUGH in *Cuff v. Penn*, that: "The principal design of the statute of frauds was that parties should not have imposed upon them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase," proceeds to say: "The statute, therefore, requires a memorandum of the bargain to be in writing, that it may be made certain, but it does not undertake to regulate its performance. It does not say that such

contract shall not be varied by a subsequent oral agreement for a substituted performance." Now it is very true, as stated in the quotation from *Cuff v. Penn*, that one of the main designs of the statute was to prevent burdensome fabricated contracts from being imposed upon parties. But a contract is only burdensome because of the consequence of performance flowing from it. *Per se* the contract is harmless. It is the performance that does the hurt. It is, therefore, at least, equally proper to say that the principal design of the statute was to protect parties from the *performance* of burdensome contracts which they never made. Therefore, if you may enforce an oral agreement for a substituted performance of a written agreement, you apply the statute to the shadow and withhold it from the substance. Such application of the statute only makes it necessary that parties have *a* contract in writing; then, under the guise of performance, *the* contract enforced is shown by parol. The defrauder and the perjurer, at whom this statute of frauds and perjuries was striking, has only to prevail upon his unsuspecting contractee to enter into writing on terms never so favorable to the victim, and then, when it comes to performance, he calls to his aid the convenient rule permitting an oral agreement for the performance of something else to be shown. Thus a clear field is given to his elastic conscience, his intrigue and subornation. Our judgment is against this. Its allowance is an utter defeat of the statute.

The judgment of the trial court will be reversed. All concur.

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P. H. Cherry, Appellant, v. The Kansas City, Fort Scott & Memphis Railroad Company, Respondent. 52 499 61 307

Kansas City Court of Appeals, January 16, 1893.

1. **Passenger Carriers:** TICKET WITH STOP-OVER PRIVILEGES: ACTION. A first-class passenger ticket read "good to stop off at all points." *Held*, this justified the passenger in stopping off at a station short of his destination, and subsequently within the life of his ticket taking another train to his destination, and though, on his presentation to the conductor of his ticket with notice of his intention to stop over, the conductor took it up, and gave no check or token in lieu thereof, the passenger's rights will not be prejudiced, and the same conductor with knowledge of all the facts will not be justified in ejecting him from the train on his subsequent resumption of his journey; nor is it incumbent on the passenger in such case to pay the additional fare and sue for its recovery, but he may sue for damages for the wrongful expulsion.

2. **Judgment:** FINAL: APPEAL. It is ruled on the authority of *Moody v. Deutch*, 85 Mo. 237, that the judgment in this case would sustain an appeal.

Appeal from the Barton Circuit Court.—Hon. D. P. Stratton, Judge.

Reversed and remanded.

H. C. Timmonds, for appellant.

(1) If the conductor could have told from the ticket presented to him, in connection with all the facts at that time within his personal knowledge, that it had not been used from Low Wassie to Grandin, then his ejection of the passenger was wrongful. And it was for the jury to say whether the conductor could so have told or not. *Kellett v. Railroad*, 22 Mo. App. 356. (2) A ticket in the hands of the passenger is not the only evidence of his right to ride. *Mackie v. Railroad*,

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9 S. W. Rep. 451; *Railroad v. Graham*, 29 N. E. Rep. 170; *Hufford v. Railroad*, 31 N. W. Rep. 544; *Murdock v. Railroad*, 137 Mass. 293. And, even if it were, this passenger handed this conductor the entire ticket, and the conductor did the only thing complained of by the company. (3) Where the passenger had originally had a ticket which has been surrendered to the conductor, and no check or voucher has been returned to the passenger, it is unlawful to eject him afterwards for failure to exhibit his ticket or pay fare. *Hamilton v. Railroad*, 53 N. Y. 25; *Townsend v. Railroad*, 4 Hun, 217; *Hennigh v. Railroad*, 31 Ind. 509; *Palmer v. Railroad*, 3 S. C. 580; s. c., 16 Am. Rep. 750; *Brauss v. Railroad*, 70 Ga. 368; *Moore v. Railroad*, 4 Gray, 465. (4) In the case at bar the passenger surrendered up to the same conductor who ejected him the whole ticket. That conductor detached part of it, and then ejected the passenger because that part had been detached. He had no right to do this, nor to demand cash fare. *Railroad v. Wolfe*, 27 N. E. Rep. 606; *Rice v. Railroad*, 64 Ind. 63. (5) It makes a difference in this case that all transactions were with the same conductor. *English v. Railroad*, 66 N. Y. 454.

Wallace Pratt and *J. C. Cravens*, for respondent.

(1) A ticket is the only evidence that the conductor can recognize that the holder has a right to ride on that particular train. *Hamilton v. Railroad*, 51 N. Y. 104; *Deitrich v. Railroad*, 71 Pa. St. 432; *Cheeny v. Railroad*, 11 Met. 121; *Bartram v. Railroad*, 11 Ohio St. 457; *State v. Overton*, 4 Zab. 438; *Johnson v. Railroad*, 45 N. H. 213; *Beebe v. Ayer*, 28 Barb. 275; *Stone v. Railroad*, 47 Iowa, 82. This last case is in all respects identical with the one at bar, except in this

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case we have the same conductor, but on a different train and different day. (2) A railroad ticket, while it is not the contract between the holder and the railroad company, is the only evidence of the party's right to be carried without further payment. *Logan v. Railroad*, 77 Mo. 663; *Davis v. Railroad*, 53 Mo. 317; *Kellett v. Railroad*, 22 Mo. App. 356; *Brien v. Railroad*, 50 Tex. 43; *Rawson v. Railroad*, 42 N. Y. 217; *Gordon v. Railroad*, 52 N. H. 599; *Yordon v. Railroad*, 54 Wis. 234; *Bradshaw v. Railroad*, 135 Mass. 407. (3) The passenger must present a proper ticket or pay his fare, and he can neither by extrinsic evidence of any kind, nor by an appeal to a conductor's memory of transactions of a previous day on a different train, prove himself exempt from doing one or the other. *Fredrick v. Railroad*, 37 Mich. 342; *Hibbard v. Railroad*, 15 N. Y. 455; *Bartram v. Railroad*, 11 Ohio St. 457.

Gill, J.—This is an action for damages because of plaintiff's alleged wrongful ejection from one of defendant's passenger trains. At the close of plaintiff's evidence the trial court sustained a demurrer thereto, whereupon a nonsuit was taken with leave, etc., and, and after an unsuccessful motion to set the same aside, plaintiff appealed to this court.

As is our duty then, we concede every fact in plaintiff's behalf, which his evidence tended reasonably to establish; and we find that such testimony tended to prove the following state of facts: At two o'clock on the morning of the eighteenth of August, 1890, plaintiff went aboard the defendant's regular passenger train at Lamar, Missouri, to ride on defendant's railroad from Lamar, Missouri, to Grandin, Missouri, and return. Just before boarding the train, plaintiff purchased of defendant's station agent at Lamar a round-trip ticket, from Lamar to Grandin and return, good

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for thirty days, and entitling him to stop off at all points.

The distance from Lamar to Grandin is two hundred and thirty-six miles. The defendant's passenger conductors were changed at Springfield and again at Willow Springs; so that plaintiff would ride with one conductor from Lamar to Springfield, with another from Springfield to Willow Springs and with a third (the one who ejected him) from Willow Springs to Grandin, his destination. There was but one passenger train running between Willow Springs and Grandin, a distance of eighty-one miles, and but one conductor, who made the round trip from Willow Springs to Grandin every day, leaving Willow Springs each morning, and returning there each evening.

After leaving Lamar at two o'clock on the morning of the eighteenth of August, plaintiff presented his ticket to the first conductor, who honored it to Springfield. After leaving Springfield he presented it to the second conductor, who honored it to Willow Springs. After leaving Willow Springs, about 8:30 on the morning of the eighteenth, the same day of its date and purchase, he presented it to the third conductor, and at the same time informed this conductor that he intended to stop off at Winona, a station thirty-eight miles east of Willow Springs. (He was going east.) The conductor made no reply, but took the ticket, honored it, tore off the going coupon (he being the last conductor through whose hands it would pass), and handed the remainder of the ticket back to plaintiff. The conductor did not give the passenger any slip or check, nor anything in lieu of the detached coupon; but simply handed the main ticket back to the passenger. The passenger was carrying the ticket in an envelope, furnished him by the station agent who sold it to him, and when the conductor handed it back to him he put it in his pocket with-

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out noticing what the conductor had done. When the train stopped at Winona, plaintiff got off and remained there till the same train, in charge of the same conductor, came along the next day (the nineteenth), when he again boarded the train to finish his journey to Grandin, forty-three miles away. When the conductor came around to take up tickets, plaintiff handed him the envelope and ticket in exactly the same condition it was in when this same conductor handed it back to him on the previous day; but the conductor refused to honor the ticket, refused to carry the passenger on it, and demanded the payment of cash fare from Winona to Grandin. The passenger refused to pay cash fare, and was, by the conductor, forcibly ejected from the train at the next station, Low Wassie, where he was left; and after getting dinner at a farm house, he went to Grandin on a freight train, which followed the passenger some two or three hours. It may be proper to say also that Cherry and the conductor were personally well acquainted with each other, and had been since the preceding June.

I. In our opinion the lower court committed error in turning the plaintiff out of court after he had made the showing above indicated. The ticket which the plaintiff held, and which he presented to Abernathy, the conductor, gave evidence of the right to ride, and of Cherry's right, too, to stop over at any station intermediate between Lamar and Grandin. The main ticket read, "Good for one first-class passage to Grandin, Missouri, and return," and further on, in the going and returning coupons, it was stated to be "good to stop off at all points." By the terms, then, of this memorandum of the contract between the defendant railroad company and the plaintiff he had purchased the right to do just as he attempted—to ride to Winona, get off, and at a future time, within the

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dates mentioned in the ticket, to enter again one of defendant's trains and finish the journey to Grandin. In other words, the ticket issued by the defendant and held by the plaintiff justified the plaintiff in going on the train to Winona August 18, stopping over till the next day, and then to take another train of the same road on to his destination. If this was Cherry's right under the contract, how did he lose it? If parted with at all it must have been because the conductor, Abernathy, detached and took from the plaintiff the going coupon before he should have done so. At some point between Willow Springs and Winona (a distance of thirty-eight miles) the conductor called for Cherry's ticket. The plaintiff passed it over to the conductor under the cover of an envelope, and at the time advised him (the conductor) that he (Cherry) would stop off at Winona. Cherry paid no attention to the conductor's treatment of the ticket, but when handed back placed it in his pocket, and did not examine it again until the next day when he again passed it over (inclosed in the same envelope) to the same conductor; and from what occurred then it would seem that plaintiff was denied passage because of the absence of the going coupon, which the evidence tends to show had been detached the previous day by this same conductor. Now we ask again, what had this plaintiff done, or omitted to do, that caused a forfeiture of his right under his contract with the defendant company?

This is not a case where a party attempts to ride without a ticket (as seems to be counsel's contention). Admitting an imperative necessity on the passenger to produce a ticket showing his right to be carried over the road (or the payment of a cash fare), conceding the duty of the conductor to be such that he must demand a ticket (or the cash), and that he is not called on to take the word of the passenger, or to "stop

and take evidence," and yet this defense is not made out by the evidence; for, if we are to give full force to plaintiff's testimony, he had a ticket entitling him to ride over this branch road from Willow Springs to Grandin, and entitling him to stop at any and all way stations, and that this ticket was presented to the conductor, accompanied with advice from the passenger that he would stop over at Winona; that with the conductor's knowledge plaintiff did stop off at Winona the eighteenth, and resumed his journey on the same train going east the next day, and again presented the main ticket, which, in connection with matters of his, the conductor's own knowledge fully informed said conductor that the ticket had not been used from Winona to Grandin, and that the same was presented by the proper person. The main ticket had indorsed on the face thereof the name of P. H. Cherry as the passenger, and the party presenting the ticket was so known by the conductor who had taken up the going coupon, and who fully understood, too, how this break in the passage had occurred. If the conductor could have told from the appearance of the ticket when presented to him the second time (taken in connection with all the facts within his personal knowledge at the time) that it had not been used on that portion of the road from Winona to Grandin, then clearly he was not justified in ejecting the plaintiff. *Kellett v. Railroad*, 22 Mo. App. 368. And that the ticket could not have been used going east from Winona to Grandin between the afternoon of the eighteenth and noon of the nineteenth was apparent to the conductor under the facts and circumstances which the evidence tended to prove. That the conductor took up the going coupon on the first day and declined or neglected to give the passenger a check or token in lieu thereof, but trusted to his own personal knowledge of the passenger whereby

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to identify him, ought not to prejudice the rights of the plaintiff.

We have read and considered all the cases cited by defendant's counsel, and find in them no precedent for the position here contended for by him. The following, among others, however, sustain plaintiff's claim: *Kellett v. Railroad*, 22 Mo. App. 356; *Railroad v. Rice*, 64 Md. 63–66; *Head v. Railroad*, 79 Ga. 358, 364; *Railroad v. Hennigh*, 39 Ind. 509; *Palmer v. Railroad*, 3 S. C. 580; *Townsend v. Railroad*, 4 Hun (N. Y.) 217.

The suggestion is made in defendant's brief that, even to admit plaintiff's right to ride on defendant's road at the time, yet he ought to have paid the additional fare demanded and sued for the return thereof as money paid under duress, unless the same was refunded. Notwithstanding the rulings of some of the courts which look that way, we think no such course was incumbent on the plaintiff, since he would thereby be purchasing a right he had already. "The plaintiff was under no obligation to purchase, even for a trifle, the right which was already his own." *Railroad v. Rogers*, 28 Ind. 1; *Graham v. Railroad*, 29 N. E. Rep. 170. By the purchase of his ticket, entering the car and displaying to the conductor the evidence entitling him to a passage, a duty arose on the part of the railroad company to carry the plaintiff over the route he sought to travel. By the company's refusal to perform this duty, and forcibly expelling the plaintiff from the train, a case was made, to-wit, an action for damages for the wrong thus inflicted on the plaintiff.

Defendant's counsel make some objection to the formality of the judgment from which this appeal was taken; it is suggested that it is not such a final judgment from which an appeal would lie. The objection is not well taken. A judgment similar in form was

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held by our supreme court to be sufficient. *Moody v. Deutch*, 85 Mo. 237.

Judgment reversed, and cause remanded. All concur.

THE STATE OF MISSOURI, Appellant, v. L. A. ANTHONY, Respondent.

St. Louis Court of Appeals, January 17, 1893.

1. **Criminal Law**: ISSUE OF PRESCRIPTION FOR INTOXICATING LIQUORS. To justify the conviction of a physician under section 4624 of the Revised Statutes for the issuance of a prescription for intoxicating liquors, to be used otherwise than for medicinal purposes, it is not requisite that the physician should have been a registered physician, nor that he should have been engaged in the practice of medicine in the county.

2. ———: ———: INDICTMENT. An indictment under that section need not set forth the prescription *in hæc verba;* nor need it state the kind or quantity of the liquor for which the prescription was issued.

Appeal from the Crawford Circuit Court.—HON. C. C. BLAND, Judge.

REVERSED AND REMANDED.

BIGGS, J.—The circuit court on motion of the defendant quashed the indictment in this cause, and the state has appealed.

Omitting the formal parts, the indictment charged "that, on the seventh day of July, 1891, at and in said county (Crawford), one L. A. Anthony, then a physician engaged in the practice of medicine, did then and there unlawfully make out and issue to one George Matlock a prescription for intoxicating liquor, to be used otherwise than for medical purposes, against the peace and dignity of the state." Then follow other

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counts of like tenor, charging the defendant with issuing other false prescriptions to other persons. The objections to the indictment were, that it charged no offense; that it failed to charge that the defendant was a registered physician, and was engaged in the practice of his profession in Crawford county; and that it failed to show that the prescription was in legal form.

No briefs having been filed on either side, we have no way of knowing the views of the trial court. The indictment is undoubtedly subject to criticism in that it is not as specific as it ought to have been, but we cannot see wherein it is fatally defective. The statute (Revised Statutes, 1889, sec. 4624), under which the indictment was preferred, reads: "Any physician, or pretended physician, who shall make or issue any prescription to any person for intoxicating liquors in any quantity, or for any compound of which such liquors shall form a part, to be used otherwise than for medicinal purposes, * * * shall be deemed guilty of a misdemeanor," etc.

It was not necessary that the defendant should have been a registered physician, nor that he should have been engaged in the practice of medicine in Crawford county. The statute says that, if "any physician or *pretended physician*" shall issue an illegal prescription, he shall be punished, etc. It could make no difference whether the defendant was a registered physician with authority to practice his profession, or was only a "pretended physician." In either case he would be liable to punishment for issuing an illegal prescription.

Neither do we think that it was necessary to set forth the prescription *in hæc verba*. Its date was given, and also the name of the party for whose benefit it was issued, and it was substantially averred that the prescription was issued to enable the party, to whom it

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was delivered, to procure intoxicating liquors for other than medical purposes. Nor was it necessary to state in the indictment the kind or quantity of liquor mentioned in the prescription. *State v. Melton*, 38 Mo. 368; *State v. Rodgers*, 39 Mo. 431.

The indictment, although subject to criticism, is in our opinion sufficiently definite to apprise the defendant of the offense, so as to enable him to prepare his defense, if he had any. That is all the law requires. The judgment will be reversed and the cause remanded. All the judges concur.

THE VILLAGE OF ORAN, Respondent, v. JOSEPH BLES, Appellant.

St. Louis Court of Appeals, January 17, 1893.

Municipal Corporations: OFFENSE AGAINST ORDINANCES OF A VILLAGE: COMPLAINT. An arrest for an offense against the ordinances of a village may be made by the marshal of the village without a warrant, when the offense is committed in his presence; and in such case the offender may be prosecuted under a charge preferred orally by the marshal.

Appeal from the Scott Circuit Court.—HON. H. C. O'BRYAN, Judge.

AFFIRMED.

Albert De Reign, for appellant.

William Hunter, for respondent.

BIGGS, J.—The defendant was arrested for the violation of an ordinance of the village of Oran, in Scott county. He was tried before the chairman of the board of trustees of the village, and found guilty, and the fine was fixed at $5. From that judgment he appealed to the circuit court of the county, where, on a trial *de novo*, he was again found guilty and a fine of

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$50 imposed. He has brought the case to this court, and insists on a reversal of the judgment on the sole ground that the complaint was not verified.

Section 1685, Revised Statutes, 1889, furnishes the authority for the arrest and conviction of the defendant by the town authorities. Among other provisions the section contains the following: "The complaint, when made by the marshal, assistant marshal or regular policeman *need not be in writiny if the defendant be present in court and in custody;* but in every other case the complaint shall be in writing and sworn to before the warrant be issued for the arrest of the defendant, and in no case shall a judgment of conviction be rendered except upon sufficient legal testimony given on a public trial, or upon a plea of guilty made in open court."

Section 1699 provides: "The town marshal shall be chief of police, and shall at all times have power to make or order all arrests, with proper process, for any offenses against the laws of the state, or of the town, by day or by night, and bring the offender to trial before the proper court, and he shall have power to arrest *without process* in all cases where any such offense shall be committed, or attempted to be committed, *in his presence.*"

The transcript of the proceedings before the chairman of the board of trustees shows that the offense was committed on the nineteenth day of March, 1892, *in the presence* of the town marshal, and there is no evidence to the contrary in the record; that the marshall, thereupon, arrested the defendant, and, on account of the lateness of the hour, released him under recognizance to appear before the chairman of the board of trustees of the village on the twenty-first day of the month; that, on the last-mentioned day, the defendant was present in court in obedience to the

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recognizance, and was thereupon held under a complaint that day made by the marshal. Among the papers sent up by the chairman was a written complaint purporting to have been made and sworn to by the marshal, but it was not signed by him. On account of this omission, the defendant moved the circuit court to dismiss the proceedings against him, which the court refused to do. It thus appears that, at the time the marshal made the complaint, the defendant "was present in court and in custody," that is, under legal arrest. Therefore, it was unnecessary for the marshal to file a written complaint, and the objection, that the paper which was filed was not verified, is without merit. The statute is plain that the marshal may arrest without a warrant, when the offense is committed in his presence, and in such a case the defendant may be prosecuted under a charge preferred orally by such officer.

With the concurrence of the other judges, the judgment of the circuit court will be affirmed. It is so ordered.

THE STATE OF MISSOURI to the use of BENJAMIN B. GUTHRIE, Respondent, v. SAMUEL P. MARTIN *et al.*, Appellants.

St. Louis Court of Appeals, January 17, 1893.

1. **Practice, Trial:** LEADING QUESTIONS TO WITNESSES. It is within the discretion of the trial court to permit, or refuse to permit leading questions to be propounded to a witness by the party producing him.

2. **Practice, Appellate:** NON-PREJUDICIAL ERROR. A judgment will not be reversed for non-prejudicial error; accordingly, error in refusing to permit a witness to testify whether a designated person had procured a judgment against him is not ground for reversal, since record proof of the judgment, if there was one, might have been produced.

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Appeal from the Mississippi Circuit Court.—Hon. H. C. O'Bryan, Judge.

Affirmed.

J. J. Russell, for appellants.

Boone & Elliott, for respondent.

Biggs, J.—This is an action on an indemnifying bond. The defendant, A. P. Martin, obtained a judgment against C. J. Hubbard and C. T. Schultz. An execution was issued on this judgment, and under the directions of Martin the sheriff levied upon an undivided one-half interest in a sawmill as the property of Hubbard. The relator claimed the property under the statute, and the bond in suit was given. The interest in the property levied upon was afterwards sold, and the proceeds applied to the satisfaction of the execution. The answer denied title in the relator, and averred that the undivided interest levied upon belonged to Hubbard, and that the pretended ownership of the relator was a mere cover to shield the property from Hubbard's creditors. There was a judgment in the relator's favor for $450, and the defendants have appealed, and complain of the action of the court in rejecting competent and relevant testimony offered by them, and also in giving and refusing instructions.

It seems to have been conceded that, at the time of the levy, the relator and one Irwin were in possession of and were operating the mill, claiming an equal ownership. The relator's evidence tended to show that he and Hubbard bought the mill together, each purchasing one-half interest; that the bulk of the purchase money was paid by Hubbard, but that the amount paid by him in excess of one-half had been refunded by the relator, except about $90, which he still owed; that

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afterwards, but prior to the levy, Hubbard had sold his undivided one-half interest to Irwin, and that the entire property was worth between $800 and $1,000. On the other hand, the defendants' evidence tended to show the insolvency of Hubbard, and also a course of dealing between him and the relator from which the alleged fraud could reasonably have been inferred. But the jury found to the contrary, and the judgment thereon cannot be disturbed unless error intervened at the trial.

The defendants introduced Hubbard as a witness and propounded to him leading questions, which the court on objections of the relator ruled out as improper. It was within the discretion of the court either to deny or permit the questions to be asked, and the exercise of this discretion cannot be assigned for error. This is well settled by the decisions in this state. *King v. Mittalberger*, 50 Mo. 182; *St. L. & I. M. Ry. Co. v. Silver*, 56 Mo. 265; *Wilbur v. Johnson*, 58 Mo. 600; *Meyer v. Railroad*, 43 Mo. 523. Neither was it permissible for the defendants to impeach Hubbard, as they attempted to do, in the absence of evidence tending to show that they were entrapped into offering him as a witness. *Dunn v. Dunnaker*, 87 Mo 597.

Hubbard was asked this question: "Did Mrs. Liggan have a judgment against you?" The court ruled the question out as leading. The witness had previously testified that there were a number of judgments against him, but he was unable to give the names of the parties in whose favor they had been rendered. We can see no reason why the question should not have been answered, but we cannot reverse the judgment for such a technical error. If there was any such judgment, it was a matter of record which the defendants might have produced, if they deemed its proof a matter of importance.

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The court of its own motion gave instructions as follows: "1. You are instructed, gentlemen of the jury, that, if you believe from the evidence that the one-half interest in the mill and appurtenances sold by the sheriff on execution in case of S. P. Martin *v.* Hubbard & Schultz was the property of B. B. Guthrie, and shall further believe that B. B. Guthrie made claim to said property to the sheriff on the levy of said property by the sheriff, and that S. P. Martin and Whitfield Anthony executed and delivered to the sheriff the bond sued upon to indemnify B. B. Guthrie and others for any damages or injury that they might sustain by reason of the sale of said property by the sheriff, and that thereupon the sheriff sold said interest in the mill property, then you should find for the plaintiff, and assess his damages at such sum as you may believe the one-half of the property was worth, not exceeding the sum of $500.

"2. Though you may believe in other transactions Guthrie had controlled and had title to Hubbard's property with intent to cover the same and defeat creditors in their demands, yet, if you believe his claim to the property in controversy is in good faith, based upon a valuable consideration, then his claim is not fraudulent, and he should recover if you so find the facts.

"3. Though you believe that Guthrie has not yet paid the full half of the purchase price for the mill and the expense in putting up the same in running order, and that he may be indebted to Hubbard for a part of said one-half interest, yet, if you believe from the testimony, that the purchase and ownership of Guthrie is in good faith, and that he has paid part of the purchase price for the one-half interest in good faith, then you should find the issues for the plaintiff.

"4. If you believe that the claim of Guthrie to the one-half of the mill sold by the sheriff is a pretended and not a real ownership, and that said mill in

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reality belonged to Hubbard, then you should find for the defendant.

"5. If you believe from the evidence that the claim of Guthrie to the one-half interest in the mill was simply a cover to conceal a secret trust for the benefit of Hubbard, then your verdict should be for the defendant.

"6. In determining whether the claim of Guthrie to the one-half of the mill is in good faith or not, or whether said claim was merely a cover to conceal a secret trust for Hubbard's benefit, you may consider the previous, contemporaneous and subsequent course of dealing between Guthrie and Hubbard in connection with the other evidence relating to the purchase and management of the mill by Guthrie.

"7. The court instructs you that, if you believe any witness wilfully swore falsely in this cause to any material matter, you may disregard the entire testimony of such witness.

"8. The court instructs the jury that, in determining the credit to be given to the testimony of witnesses in the cause, they may take into consideration the fact that such witness is a party to the suit or is interested in the result of the litigation."

These instructions presented the issues fully and fairly, and those asked by the defendants and refused by the court would not have thrown any additional light on the questions at issue, or in anywise aided the jury in their solution. We deem it proper, however, to notice briefly the defendants' instruction as to the measure of damages, which the court refused to give. It will be observed that the instructions of the court directed a finding for the value of one-half of the mill, in case the verdict was for the relator. The defendants asked the following instruction: "The court instructs you that, if you should believe from the evidence that

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the plaintiff had any interest in said sawmill, you should only find for him in such sum as you believe his interest that he owned at the time of the seizure and sale was reasonably worth, together with such damages as you may think him entitled to under the instructions of this court."

This instruction was predicated on the testimony of one of the relator's witnesses, who testified on cross-examination that, on the day of the sale, the relator stated that he only had $265 in the mill, or a working interest in it of that amount. This at most amounted to a statement that the relator had invested, either in money or money's worth, that amount in the purchase of the mill. There is nothing in the testimony of the witness to indicate that the interest claimed by the relator was less than an undivided one-half, concerning which there was no conflict in the other evidence. Besides it was the theory of Martin that the interest claimed by Guthrie was an undivided one-half, and that such interest in fact belonged to Hubbard, and the levy and sale were made accordingly. We are, therefore, of opinion that the instruction was properly refused.

Fnding no error in the record the judgment of the circuit court will be affirmed. All the judges concur.

JOHN MACKLER *et al.*, Appellants, v. THE MISSISSIPPI RIVER & BONNE TERRE RAILWAY COMPANY, Respondent.

St. Louis Court of Appeals, January 17, 1893.

Liens Against Railroads: PLEADING: VARIANCE. Both the lien filed against a railway company for work done in the construction of its road, and the petition in an action for the enforcement of it, should state the facts showing that the work was performed by the

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lienor under contract either with the railway company or its agent, or with one of the contractors or subcontractors therefor; and these statements should substantially agree. But *held,* that it was not a variance to state in the lien that the lienor contracted with the railway company, and in the petition that he contracted with a corporation acting in the premises as the agent or trustee of the railway company.

Appeal from the Mississippi Circuit Court.—Hon. H. C. O'Bryan, Judge.

Reversed and remanded.

J. J. Russell, for appellants.

M. L. Clardy and *Wm. Carter & Weber,* for respondent.

Biggs, J.—The plaintiffs, as subcontractors under one Pardesky, sue to enforce a contractor's lien against the right of way, depots, bridges, etc., of the defendant's railroad, for work and labor alleged to have been done by them in the construction of said railroad. On the trial the plaintiff offered in evidence their lien paper, which the court excluded on the objection of the defendant that there was a variance between it and the petition. To this ruling the plaintiffs objected and excepted, and thereupon they took a voluntary nonsuit. The court having refused to vacate the judgment of nonsuit, the plaintiffs have appealed, and insist that there was no material variance between the paper and the amended petition. The record presents no other question for decision.

In support of the judgment of the court it is urged that the petition alleged that Pardesky made his contract with the St. Joseph Lead Company, whereas the lien paper stated that his contract was with the defendant railway company.

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That portion of the lien paper, which is pertinent, reads: "Said work and labor was done under a contract made by said firm of John Mackler & Co., composed as aforesaid, the claimants with Charles Pardesky, general or principal contractor with said Mississippi River & Bonne Terre railway for the building of that section and portion of said railroad and roadbed above described, and upon which said work was done by John Mackler & Co.; that the name of the railroad against which this lien is intended to apply is the Mississippi River & Bonne Terre railway." The amended petition contained this averment: "That Charles Pardesky was the original or principal contractor with the St. Joseph Lead Company, a corporation interested in the construction of the railroad of defendant, for the doing of the work in constructing the railroad of defendant, and particularly that portion of said railroad upon which work and labor was done by plaintiffs, as hereinafter particularly set forth and mentioned. Plaintiffs state that the St. Joseph Lead Company at all times herein mentioned was largely interested in the construction of said road; and that many of the stockholders, officers and agents of said St. Joseph Lead Company have been since the organization of the defendant company stockholders, officers and agents, respectively, thereof; that said railroad was constructed under the supervision, as chief engineer thereof, of one of the officers, to-wit, the chief engineer of said St. Joseph Lead Company. Plaintiffs state that said road was constructed under said contract with Pardesky; that, although said contract was made as aforesaid by said Pardesky with said St. Joseph Lead Company, plaintiffs state that all of the work thereunder was done for the benefit of defendant company and in the necessary construction of its railroad, and particularly the work of plaintiffs as hereinafter

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stated; that defendant company accepted said work, and particularly the work of plaintiffs, and from time to time gave estimates to said Pardesky as chief contractor for work done as aforesaid, and so plaintiffs say that said St Joseph Lead Company in the matter of contract aforesaid acted as the agent or trustee of said defendant company."

Section 6741, Revised Statutes, 1889, provides that *all* persons who perform work or furnish materials in the construction of any railroad in this state shall have a lien on the roadbed, depots, bridges, etc., of such road, to the amount of such work done or materials so furnished, "provided such work and labor is performed, and such materials are furnished, under and in pursuance of a contract with such railroad company, its agents, contractors, subcontractors, lessees or construction company, organized for the uses and purposes of such railroad company, or having in charge the building, constructing or improvement of such railroad or any part thereof."

It is quite evident that a petition to enforce such a lien ought to aver that the claimant performed the work either under a contract made with the railroad company itself or some one of its authorized agents, or with one of its contractors or subcontractors engaged in the construction of such railroad. The lien paper also ought to state the facts showing such contractual relation, and the statements in both should substantially agree. But, in the case before us, we can see no variance between the averments of the petition in respect of the contract and the statements in the lien paper in reference thereto. The petition, when stripped of its verbiage, alleges that the contract of Pardesky was made with the St. Joseph Lead Company as the *agent or trustee* of the defendant. The lien paper states that Pardesky made the contract with the defend-

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ant. There is no variance between the two statements. Both allege a contract with defendant. Proof that the contract was made with the St. Joseph Lead Company, and that the lead company acted in the premises as the agent or trustee of the defendant, would, for the purposes of the lien, be held to be the contract of the defendant. The fact, that the plaintiff did not first introduce evidence tending to show such agency, did not justify the court in rejecting the lien paper as evidence in the first instance. Besides the objection was that the paper was "incompetent for the reason that the same did not correspond with the petition." For the reasons stated, we do not think that this objection was well taken, and we will, therefore, reverse the judgment and remand the cause. All the judges concur.

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THE STATE OF MISSOURI, Appellant, v. WILLIAM HALEY, Respondent.

St. Louis Court of Appeals, January 17, 1893.

1. **Criminal Law:** INFORMATION. When an offense is specifically described or defined by the statute, it is sufficient for an information to charge it in words of the statute; and an information is sufficiently definite, when it apprises the defendant of the charge which he is called upon to meet. An information charging cruelty to animals is *held* sufficient herein under these rules.

2. ———: ———. As an assistant prosecuting attorney acts upon his official oath, it is unnecessary for him to verify an information filed by him.

Appeal from the Monroe Circuit Court.—HON. THOMAS H. BACON, Judge.

REVERSED AND REMANDED.

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J. H. Whitecotton, Prosecuting Attorney, for appellant.

The motion should not have been sustained because the information charges the offense in the language of the statute. Revised Statutes, 1889, sec. 3896; *State v. Bun*, 81 Mo. 108. The law does not require an information to be verified as has been settled since this cause was passed upon. *State v. Ransberger*, 106 Mo. 135.

No brief filed for respondent.

Rombauer, P. J.—The state appeals from the judgment of the circuit court quashing an information in the following words:

"State of Missouri, } ss.
"County of Monroe. }

"The State of Missouri *v.* William Haley.

"Before R. E. L. Sevier, a justice of the peace, within and for Monroe township, Monroe county, Missouri.

"William T. Ragland, assistant prosecuting attorney within and for the county of Monroe in the state of Missouri, informs the justice that one William Haley, on or about the thirtieth day of March, A. D. 1891, at the said county of Monroe, did then and there unlawfully torture two domestic animals, to-wit, two black mares, the property of E. P. Nelson and D. D. Nelson, by then and there forcing said animals through mud and over miry roads with violent speed, by cruelly whipping and beating them, the said mares, when they were greatly distressed, fatigued and injured by reason of having been previously driven over a great distance of muddy roads, and with great speed, against the peace and dignity of the state.

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"William T. Ragland, assistant prosecuting attorney within and for the county of Monroe, as aforesaid, further informs the justice that William Haley, on or about the thirtieth day of March, 1891, at the said county of Monroe, did then and there unlawfully and cruelly overdrive two domestic animals, to-wit, two black mares, by then (and there) driving said animals through mud and over miry roads with violent speed, by whipping and beating them, the said mares, when they were greatly distressed, fatigued and injured by reason of having been previously driven, with great speed, a long distance over muddy roads, against the peace and dignity of the state.

"WILLIAM T. RAGLAND,
"Assistant Prosecuting Attorney."

The respondent does not appear in this court, but his motion to quash the information was grounded on the reasons that the information did not charge any offense under the laws of the state; that it was not properly verified, and that there was a variance between the information and the affidavit upon which it was based. The last objection may be disposed of with the observation that, even if it were otherwise tenable, it is not supported by the record.

The information charges the offense in the words of the statute, which is sufficient where the act specifically describes or defines the offense. *State v. Walker*, 24 Mo. App. 679; *State v. Fare*, 39 Mo. App. 110. As it fully apprises the defendant of the charge he is called upon to meet, it is definite enough. *State v. Buck*, 43 Mo. App. 443, 447. As the prosecuting attorney acts upon his official oath, it was unnecessary for him to verify the information. *State v. Ransberger*, 106 Mo. 135, 145. The assistant prosecuting attorney occupied the same position in that regard. *State v. Hynes*, 39 Mo. App. 569. The charge in this informa-

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tion expressly avers the overdriving and the circumstances of cruelty attending it, which distinguishes the case from *State v. Pugh*, 15 Mo. 509. We must, therefore, conclude that the judgment quashing the information was erroneous.

As the case must be remanded for new trial, we call the attention of the parties to *State v. Roche*, 37 Mo. App. 480, and *State v. Hackfath*, 20 Mo. App. 614, as determining the character of the proof required in substantiating this offense.

All the judges concurring, the judgment is reversed and the cause remanded.

F. X. Marchildon, Appellant, v. Patrick O'Hara, Respondent.

St. Louis Court of Appeals, January 17, 1893.

1. **Waiver of Right to Exemptions:** GARNISHMENT AT THE INSTANCE OF THE EXECUTION DEBTOR. The mere fact that an execution debtor procures the garnishment of one who owes him money will not debar him from claiming his exemptions out of the debt, if the debt exceeds the amount of the exemptions, since his action is consistent with an intention to only appropriate the excess to the payment of the execution.

2. **Garnishment:** RIGHT OF EXECUTION DEBTOR TO EXEMPTIONS OUT OF FUND PAID INTO COURT. An execution debtor is entitled to claim his exemptions out of funds paid into court by his debtor as garnishee under the execution.

Appeal from the Cape Girardeau Circuit Court.—Hon. H. C. O'Bryan, Judge.

Affirmed.

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J. W. Limbaugh, for appellant.

(1) Defendant's exemption rights could not be tried and determined by a motion to quash the levy of an execution. *State ex rel. v. Bierwirth*, 47 Mo. App. 551; *State ex rel. v. Barada*, 57 Mo. 562; *State v. Barnett*, 96 Mo. 133; Freeman on Executions, sec. 271. (2) Assuming that a defendant's exemptions may be set apart to him under a proceeding to quash the levy of an execution, yet when such levy is made by his direction his right to make the claim is lost. He may thus waive his right to claim his exemptions. *Hombs v. Corbin*, 20 Mo. App. 497.

No brief filed for respondent.

Rombauer, P. J.—The defendant, claiming that one Ball was indebted to him in the sum of $855 for work done on the St. Louis, Iron Mountain & Southern railroad as subcontractor under said Ball, brought suit against Ball and the railroad company, and recovered a judgment against both for $353.55 on May 7, 1891. The plaintiff sued the defendant on an open account, obtained judgment against him on January 4, 1890, and caused the railroad company to be summoned as garnishee on an execution issued on this judgment. There being a number of claims outstanding against the defendant, the railroad company asked and obtained leave to pay this amount of $353.55 and interest into court. The defendant O'Hara, thereupon, filed a motion to quash the levy of the execution as far as this money is concerned, on the ground that the judgment against the railroad company was not a personal judgment, and, hence, not subject to seizure, and, on the further ground that he was the head of a family, had no property specifically exempt by statute, and the sheriff in mak-

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ing the levy failed to notify him of his exemptions. This motion upon its trial was by consent of court, and without objection as far as the record shows, changed into a motion to set off and admeasure the defendant's exemptions in the money thus paid into court by the railroad company. A hearing of the motion before the court resulted in a judgment order that the clerk, out of the money thus paid into court, pay to the defendant O'Hara the sum of $300 in lieu of his specific exemptions as the head of a family, and that he retain the residue subject to future orders. From this judgment the plaintiff appeals, and assigns for error that the court erred in its declarations of law and in its finding on the evidence.

Besides the facts above recited, which are conceded by the record, there was evidence adduced by the plaintiff, which tended to show that he instituted the suit and garnished the railroad company upon the defendant's request, and that the defendant told him he was anxious to see him paid out of his claim against the railroad company. The defendant gave evidence tending to show that these requests took place before he recovered his judgment against the railroad company, and when he thought his claim against the company amounted to $855 and was ample, over and above his exemptions of $300, to pay the plaintiff's claim in full. The defendant also gave evidence tending to show that he was the head of a family, and had no other property but wearing apparel, besides this judgment.

The plaintiff asked the court, but it refused, to declare the law as follows: "The court declares it to be the law that a defendant in execution may waive the exemptions given him by the statutes; and, if the court believes from the evidence that defendant O'Hara told plaintiff to reduce his claim to judgment, and directed him to garnish the railroad company for the purpose

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of making his debt against defendant O'Hara, and that plaintiff, in pursuance of O'Hara's directions, garnished said railroad company on execution for said debt, O'Hara cannot now claim said judgment against the railroad company as exempt from plaintiff's execution, and the finding should be for plaintiff."

There was no error in this ruling. A person may unquestionably waive his exemptions in favor of any creditor (1 Freeman on Executions, sec. 214; *Robards v. Samuel*, 17 Mo. 555), but all the facts hypothetically stated in the instruction do not constitute a waiver as a matter of law. Waiver is a question of intention and a fact to be determined by the triers of the fact (*Ehrlich v. Ins. Co.*, 88 Mo. 249), and the court could not declare as a matter of law that certain facts, if shown, amounted to a waiver, when such facts were in no way conclusive on the question of intention. Not only the defendant's claim but even the defendant's judgment was in excess of his exemptions, and his request to the plaintiff to garnish the railroad company is not at all inconsistent with an intention on his part, that the plaintiff by such garnishment should secure everything beyond the defendant's exemptions.

The plaintiff asked the following instruction, which the court gave: "The court declares the law to be that the defendant cannot by motion to quash the levy of execution herein have his exemption rights determined."

While the record is silent on the subject, it was probably owing to this instruction that the defendant changed the form of his motion upon the trial. As no exceptions were saved to the ruling of the court in permitting the change, there is nothing before us for review on that subject. It will not be seriously contended that a debtor may not claim his exemptions in funds which the garnishee has paid into court. Since

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the claim is in the nature of a personal privilege, which the garnishee cannot assert for the debtor, it is proper for the debtor to assert his claim after the garnishee has paid the fund into court.

Finding no error in the record the judgment is affirmed. All concur.

CHARLES J. ANDERSON, Respondent, v. A. B. PERKINS *et al.*, Appellants.

St. Louis Court of Appeals, January 17, 1893.

Practice, Trial: VACATION OF JUDGMENT: LACHES OF ATTORNEYS. The attorneys for the defendant in this cause filed an insufficient application for a change of venue, and then left the court. This application was overruled and the cause was tried in their absence. *Held* that they were guilty of laches, and that the refusal of the trial court to vacate the judgment upon motion of the defendant was, therefore, not erroneous.

Appeal from the Scott Circuit Court.—HON. H. C. O'BRYAN, Judge.

AFFIRMED.

Albert De Reign, for appellants.

The appellant had the right to have his counsel attend and protect his interest at the trial. He was guilty of no negligence. *Fretwell v. Laffoon*, 77 Mo. 26; *Ruggles v. Hall*, 14 John. 112; *Peers v. Davis*, 29 Mo. 184; Hilliard on New Trials, 425; *Delmar v. Martin*, 39 Cal. 555; *Patterson v. Ely*, 19 Cal. 28; *Spaulding v. Meir*, 40 Mo. 176; *Brown v. Sanford*, 44 Wis. 282; *Wyman v. Lee*, 5 Ga. 237; *Meredith v. People*, 84 Ill. 480.

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J. J. Russell, for respondent.

Aside from the want of statutory authority for this proceeding in attempting to vacate the judgment rendered, the appellants state no equity in their motion, but make it clearly appear that it was purely their neglect, or the laches of their attorneys, and in either case the law is the same. *Biebinger v. Taylor*, 64 Mo. 63; *Gehrke v. Jod*, 59 Mo. 522; *Bowman v. Field*, 9 Mo. App. 576. The absence of an attorney is not a good ground to set aside a judgment. *City of St. Louis v. Murphy*, 24 Mo. 40.

Rombauer, P. J.—This suit is upon an account, and was brought to the October term, 1891, of the circuit court of Scott county. The defendant James filed an answer at that term, and the defendant Perkins entered his appearance, and asked and obtained leave to answer by the first day of the succeeding term. On the first day of the April term, 1892, the defendant James appeared and filed an affidavit for a change of venue. This affidavit was insufficient under section 2260 of the Revised Statutes, because it failed to state when knowledge of the existence of the cause for such change came to the affiant's knowledge, or that it came to his knowledge since the adjournment of the last regular term of the court. The motion was overruled, the cause tried in the absence of the defendants, and final judgment rendered against them.

Before the close of the April term, but more than four days after trial, the defendants moved to vacate the judgment on the ground that they made no preparation for trial, relying upon the fact that their motion for change of venue would be sustained; that they had a meritorious defense, and that the defendant James left for home as soon as he filed his affidavit for a

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change of venue, and that the motion to vacate the judgment was filed as soon as he could return after being notified of the rendition of the final judgment; also that their regular attorney was unavoidably absent at the April term of court. The court overruled this motion likewise, and this ruling is assigned for error by the appealing defendants.

Judgments rendered by trial courts are within their control during the term when rendered. The court may set them aside for cause, even though the motion for new trial has not been filed within the statutory time. *Nelson v. Ghiselin*, 17 Mo. App. 663. But where the court refuses to vacate a judgment upon a motion filed more than four days after trial, the appellate court will not interfere unless the judgment is erroneous upon the record, or the discretion of the court has been oppressively exercised against the complaining party. In the case at bar the judgment rendered is warranted by the record. The fact, that the trial was had in the absence of the defendants and their attorney, was due to their own laches. They would not be entitled to relief, even if they had filed their motion in time. *Gehrke v. Jod*, 59 Mo. 522; *Peers v. Davis*, 29 Mo. 184; *Fretwell v. Laffoon*, 77 Mo. 26. *A fortiori* are they not entitled to relief, when the granting of such relief depends on the abuse of judicial discretion, and no such abuse is shown?

All the judges concurring, the judgment is affirmed.

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George K. Young, Respondent, v. The Kansas City, Fort Scott & Memphis Railroad Company, Appellant.

St. Louis Court of Appeals, January 17, 1893.

1. **Practice, Trial:** OBJECTIONS TO EVIDENCE. An objection to the competency of evidence as to value is not specific enough to raise the question, whether the witness is qualified to testify as an expert upon the subject.

2. **Railroads:** DAMAGES. In an action against a railway company for double damages for the killing of a bull, which was more valuable for breeding purposes than for meat, such greater value should be taken into consideration in the assessment of the damages.

Appeal from the Howell Circuit Court.—Hon. Joseph Cravens, Judge.

Affirmed.

Olden & Orr, for appellant.

No brief filed for respondent.

Rombauer, P. J.—The action is one to recover double damages for the killing of plaintiff's bull and hog by defendant's locomotive on a part of defendant's road where it was not fenced, and where it was its legal duty to fence it. There was a verdict for plaintiff for $36, and the court entered judgment thereon for double the amount. The errors assigned by the appealing defendant are that the court admitted incompetent evidence touching the value of the stock, and misdirected the jury as to the measure of damages.

The plaintiff gave evidence tending to show that the bull was a Durham bull of the maximum value of

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$100, and that he had paid $35 for it; also that the hog was worth $10. The defendant gave evidence tending to show a maximum value of $30 for the bull, and $4.50 for the hog as marketable meat. Both the plaintiff's and defendant's witnesses testified that bulls have a higher value for breeding purposes than for meat. The finding of the jury, as will be seen, was far below the value placed upon the stock by the plaintiff's evidence, and but little above the highest value testified to by the defendant's witnesses. Neither the plaintiff's nor the defendant's witnesses qualified as experts.

Touching the first assignment of error the record shows that, when the plaintiff's witnesses were interrogated as to values, the questions put to them were objected to as incompetent. The objection now made is that the witnesses were not qualified to speak on the subject. Had the objection been put on that ground, the witnesses could easily have qualified by showing that they were farmers, buying and selling stock, which in fact does appear inferentially from other parts of their evidence. Value is mere matter of opinion. *Springfield & Southern Ry. Co. v. Calkins*, 90 Mo. 538, 543; *Cantling v. Railroad*, 54 Mo. 385, 391. There is no merit in plaintiff's first assignment.

Neither is the second error well assigned. Since all the evidence shows that a bull has a value for breeding purposes beyond its value for marketable meat, the court properly instructed the jury that they could take such value into consideration. Neither does the motion for new trial complain of any excess in the verdict.

There is no merit in the appeal. The judgment is affirmed, All the judges concur.

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W. W. TOLER *et al.*, Respondents, v. A. J. McCABE *et al.*, Appellants.

St. Louis Court of Appeals, January 17, 1893.

1. **Practice, Appellate:** REVIEW OF FINDINGS OF FACT IN PROCEEDINGS IN EQUITY. When the evidence in an action in equity is conflicting, the appellate court will defer somewhat to the finding of the trial court, since the latter court had the witnesses before it, and was, therefore, in the better position to judge of their credibility.

2. ——: ——: REPRODUCTION OF THE EVIDENCE. If the appellant in an action in equity desires to obtain a review by the appellate court of the finding of the trial court, he must as far as practicable reproduce in his transcript the same evidence which was before the trial court; and, in such case, where the witnesses testify as to the location of points or objects on a plat, and the location thereof is material, the points indicated by them should appear in some appropriate manner.

Appeal from the Howell Circuit Court.—HON. W. N. EVANS, Judge.

AFFIRMED.

Livingston & Green, for appellants.

Olden & Orr, for respondents.

ROMBAUER, P. J.—It is conceded by the pleadings and evidence in this case that, in November, 1890, the plaintiff sold to the defendants a part of lot 1, in block 3, of the city of West Plains, and that said lot, although somewhat irregular in its shape owing to an offset in the middle of its southern line, had a frontage of seventy-four feet by a depth of one hundred and seventy-three feet. It is also similarly conceded that, by a mistake of the scrivener who drew the instruments

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of conveyance and reconveyance, both the deed of plaintiffs to defendants, and the deed of defendants reconveying the property in trust to secure the purchase money, misdescribed this lot by locating it seventy-one feet further north than the lot actually sold was. The plaintiffs, thereupon, first having tendered to the defendants a deed correctly describing the lot, instituted the present action to compel the defendants to execute a deed of trust containing a proper description. Upon the trial of this action such proceedings were had, that the court made a decree in favor of the plaintiffs according to the prayer of their petition. From this decree the defendants appeal, assigning for error that the court erred in not granting the affirmative relief prayed for in their answer, rescinding the entire contract of sale on the ground of misrepresentation and mistake.

The answer of the defendants sets up the following facts, on which their prayer for affirmative relief was based: It first admitted that the plaintiffs intended to sell to them, and that they intended to buy, the property first hereinabove described. It then averred that, at the time, the defendants knew nothing of the actual boundaries of the lot, and relied on the plaintiffs' statement as to its location and boundaries; and that the plaintiffs' statement of the boundaries was untrue in this, "that plaintiffs showed the defendants where the line on the south side of said lot runs, when in truth and in fact such line does not run where represented by plaintiffs, but is and runs ten feet north of the line shown defendants by plaintiffs, as aforesaid, thereby leaving off of such lot ten feet on the north (south) side thereof." The answer then goes on to state that these ten feet were the most valuable part of the supposed lot; that they formed a material inducement to the purchaser; and that the lot described in

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the reformed description is unfit for the purposes for which the defendants purchased the same. The answer then concludes with a prayer for a rescission of the contract, and for a judgment for the part of the purchase money paid, and for amounts expended in improvements before the mistake was discovered.

It will be thus seen that the answer is in the nature of a confession and avoidance. It first concedes that the plaintiffs sold to the defendants, and that the defendants bought of the plaintiffs, the very property described by *metes and bounds* in the petition of the plaintiffs, and then seeks to avoid the claim of the plaintiffs for relief, and seeks a rescission of the contract, on the ground of misrepresentations as to the *boundaries* of that property. This apparent inconsistency in the answer, however, was not taken advantage of in any manner by the plaintiffs, but the parties went to trial before the court, adducing evidence *pro* and *con* as to the alleged misrepresentations and their materiality. That evidence is set out in the record, as will be hereafter seen, *in part* only, and the defendants ask us to render a decree in their favor on such evidence.

We shall at the outset concede the law as claimed by the defendants, namely, that if material misrepresentations were made by the plaintiffs as to the boundaries of their property, and the defendants, relying upon such representations, were induced to consummate the bargain, then it is immaterial whether the plaintiffs made them knowingly or innocently. *Hickey v. Drake*, 47 Mo. 369; *Isaacs v. Skrainka*, 95 Mo. 517, 524, and cases cited. We will also concede that this court, in cases in equity, re-examines the evidence and renders such decree as the evidence demands. *Berberett v. City of Edina*, 19 Mo. App. 551. On the other hand, where the evidence is conflicting, all appellate courts defer somewhat to the finding of the trial court, which

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had the witnesses before it, as it is in better position to judge of the credit to which their evidence is entitled than the appellate court can possibly be. *Erskine v. Loewenstein*, 82 Mo. 301, 309; *Taylor v. Cayce*, 97 Mo. 242, 249.

We are not advised whether the trial court found against the defendants on the ground that no misrepresentations were made, or on the ground that they formed no material inducement to the bargain. On both these questions it was incumbent upon the defendants to make out their case by a preponderance of the evidence. On the first question the defendants testify to the representations, but the plaintiffs deny them, and there is no outside evidence in support of either party. On the next question, the record before us is perfectly blind. The witnesses testified with a plat before them, on which they pointed out the different lines marked by letters on the plat, and the different points and objects on the ground, by pointing to them with their fingers on the plat. There is a plat in the record, but there are no letters on it, and where the different objects and points were, to which the witnesses pointed with their fingers, rests on the record before us upon the barest conjecture. The record leaves it even wholly unsettled whether there was, or was not, any deficiency in the quantity of the ground conveyed, although the answer of the defendants seems to negative any deficiency in that respect.

It must be obvious that, before an appellant can seek a view of the findings of the trial court on appeal, he must, as far as practicable, reproduce in his transcript the same evidence which was before the trial court. Where witnesses testify as to the location of points or objects on a plat, the location of which is material, the points indicated by them must appear by letters or numerals, or in some appropriate way. Where this is

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not done, a review of such questions of fact becomes impracticable.

It results from the foregoing that the judgment must be affirmed, and with the concurrence of all the judges it is so ordered.

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THE STATE OF MISSOURI *ex rel.* GEORGE L. SPANGLER, Defendant in Error, v. MARY A. IMMER *et al.*, Plaintiffs in Error.

Kansas City Court of Appeals, January 30, 1893.

Principal and Surety: ATTACHMENT BOND: JUDGMENT AND GARNISHMENT ON FORTHCOMING BOND. A defendant in attachment gave a forthcoming bond, which, after judgment and execution unsatisfied in the attachment proceeding, was assigned to attaching plaintiff who had judgment thereon, and took out execution and summoned S. as garnishee. S. won on the garnishment proceeding and recovered his attorney's fees and costs. To collect this judgment he commenced suit on the original attachment bond. *Held,* the action was maintainable.

Appeal from the Henry Circuit Court.—HON. JAMES H. LAY, Judge.

AFFIRMED.

A. Haynie, for plaintiffs in error.

(1) When the liability of sureties is involved, courts will not extend the construction of an instrument beyond its plain and obvious meaning. *Cochrane v. Stewart,* 63 Mo. 424; *Nofsinger v. Hartnett,* 84 Mo. 549; *Bauer, Ex'r, v. Cabanne,* 105 Mo. 110; *Mfg. Co. v. Hibbs,* 21 Mo. App. 574. (2) The surety's obligation cannot be extended to other subjects, persons or peri-

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ods of time than those expressly included in his contract. *Nofsinger v. Hartnett, supra; Bauer, Ex'r, v. Cabanne, supra; Fisse v. Einstein*, 5 Mo. App. 78.

W. E. Owen, for defendant in error.

Plaintiffs in error first contend that the demurrer ought to have been sustained, because the attachment bond does not provide relief for damages that may result from a judgment upon a forthcoming bond. That it is not so nominated in the bond, and, therefore, the law cannot award such damages; that it is a statutory bond, and cannot be enlarged by liberal intendment. This may be conceded. And, admitting further, for the moment, that the suit is brought to collect damages resulting from a judgment on a forthcoming bond, we think such damages can be collected by suit on the original attachment bond. Eliminating from the "condition" all words and phrases not germane to this issue we have, "and pay all damages and costs that may accrue to any garnishee by reason of (the attachment) any process or proceeding in the suit." Is not the judgment upon the forthcoming bond a process and proceeding in the suit—the attachment suit? Clearly so; for the statutes provide for taking judgment upon forthcoming bonds in case of default by simple motion filed, not in a new suit, but in the original attachment suit. And how, then, can it but be a "process or proceeding in that suit?" The words are not "judgment upon the attachment," but "any judgment or process thereon." The word "thereon" in the position and sense here used reveals an evident legislative intent to make the condition of the attachment bond broad enough to cover any possible damage that may accrue to any defendant or garnishee by reason of

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any proceedings in the suit authorized by law. Such was, no doubt, the intention. Such is justice and right.

SMITH, P. J.—This is a suit on an attachment bond, wherein the relator had judgment and defendants have brought the case here by writ of error. It appears from the record before us, that the defendant in the attachment suit, after the seizure of his property by the sheriff under the writ, executed a forthcoming bond with sureties thereon, as provided in section 644, Revised Statutes. Plaintiff had judgment in the attachment suit and caused execution to be issued thereon, which was returned unsatisfied. The court thereupon directed the sheriff to assign the forthcoming bond to plaintiff, which was accordingly done, and, upon motion of the plaintiff in the attachment, judgment was rendered against the defendant and his sureties on the said forthcoming bond. Revised Statutes, sec. 574. Execution was issued on this last-named judgment, and the relator was summoned as garnishee thereon. Upon the issues made in the garnishment proceedings, the garnishee prevailed with costs, consisting of an attorney's fee, clerk and sheriff costs; the two last items were assigned to the garnishee, and to recover which this suit was instituted against the plaintiff and her sureties on the attachment bond.

The only question in the case is, whether the plaintiff and her sureties are liable on the attachment bond for the costs which were adjudged in favor of relator in the trial of the garnishment issues. This must be determined by reference to the terms of the attachment bond, which are that, "if the said plaintiff shall prosecute her action without delay and with effect; refund all sums of money that may be adjudged to be

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refunded to defendant, or found to have been received by the plaintiff and not justly due to her; and pay all damages and costs that may accrue to any defendant or garnishee, by reason of the attachment or any process or proceedings in the suit, or by reason of any judgment or process thereon, then this obligation to be void; otherwise to remain in full force." The rule is well settled in this state, that, where the liability of sureties is involved, courts will not extend the construction of an instrument beyond its plain and obvious meaning. *Mfg. Co. v. Hibbs*, 21 Mo. App. 574; *Cochrane v. Stewart*, 63 Mo. 424; *Bauer v. Cabanne*, 105 Mo. 110. Nor to other subjects, persons or periods of time than those expressly included in the sureties' contract.

The obligation of the bond by the express terms thereof was that the obligors would "pay all damages and costs that may accrue to any * * * garnishee * * * by reason, *first*, of the attachment, or, *second*, any process or proceeding in the suit, or, *third*, by reason of any judgment or process thereon." The judgment on the forthcoming bond against the sureties thereon, under the statute, took the place of the judgment against the attached property, and the notice to the relator as garnishee on the execution issued on the judgment was a "process thereon," as much so as if it had been given on the execution on the first judgment.

Our construction is the practical one, and best accords with what seems to us to have been the intent of the lawmaker in requiring bond in attachment suits, viz., to provide indemnity to any defendant, garnishee or interpleader against damages and costs which may accrue to them by reason of the attachment, or any process or proceeding in the suit, or by reason of any

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judgment or process thereon. We think the relator was a garnishee for whom indemnity was provided in the attachment bond, and, such being our conviction, the judgment will be affirmed. All concur.

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ISAAC P. SIMPSON, Appellant, v. WILLIAM J. McGONEGAL, Respondent.

Kansas City Court of Appeals, January 30, 1893.

1. **Municipal Corporations:** COUNCIL DE FACTO: ACTS VALID. An ordinance of the Kansas City council authorizing certain street improvement and passed while the four Westport wards were represented in the council is valid, though such Westport wards were not part of the city and its representatives were not *de jure* members of the council, and though such representatives voted for the ordinance, and without their vote it failed of the necessary majority.

2. **Officers:** DE FACTO OFFICE AND OFFICER: RULE. To render valid the acts of an officer *de facto*, it is not always necessary that there should be an office *de jure;* the rule rests rather on the color of the right appearing in the acting officer and not upon any difference between a *de facto* and *de jure* office. (*Following Adams v. Lindell,* 5 Mo. App. 197; S. C., 72 Mo. 198.)

3. **Definitions:** OFFICER DE FACTO. The following definitions occur in the opinion: An officer *de facto* is no other than he who has the reputation of being such, and yet is not a good officer in point of law; an officer *de facto* is one whose acts though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

AFFIRMED.

Ed. G. Taylor, for appellant.

(1) As a matter of law the eleventh, twelfth, thirteenth and fourteenth wards were never in the city, and

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they could not, therefore have members in the lower house. *City of Westport v. Kansas City*, 103 Mo. 141; Charter of Kansas City, 1889, art. 2, sec. 1, p. 9. (2) Where there could not be a member *de jure*, there could not be a member *de facto*. *Ex parte Snyder*, 64 Mo. 58; *Jester v. Spurgeon*, 27 Mo. App. 477; *Norton v. Shelby Co.*, 118 U. S. 425; *Hildreth v. McIntire*, 1 J. J. Marsh. (Ky.) 206; *State v. Francis*, 26 Kan. 724; *Prouty v. Stover*, 11 Kan. 235; 1 Dillon on Municipal Corporations [6 Ed.] secs. 214, 276; *In re Hinkle*, 31 Kan. 712; *McCahan v. Commissioners*, 8 Kan. 437; *Braidy v. Theritt*, 17 Kan. 468; *Decorah v. Bullis*, 25 Iowa, 15; Charter of Kansas City, 1889, art. 2, secs. 2, 4, 5, 6, p. 9; art. 17, sec. 42, p. 135; *Carlton v. People*, 10 Mich. 250; *State v. Dunson*, 71 Tex. 65; *Buford v. State*, 72 Tex. 182; *People v. Oakland*, 28 Pac. Rep. 807. (3) The power of a city to compel property-owners is to be strictly construed, and unless an ordinance in exercise of the power is passed in strict conformity to the provisions of the charter it is void. *Kiley v. Openheimer*, 55 Mo. 374; *Leach v. Cargill*, 60 Mo. 316; *Ruggles v. Collier*, 43 Mo. 353; Cooley on Constitutional Limitations [6 Ed.] 155, 233; *Swift v. Williamsburg*, 24 Barb. (N. Y.) 427; *State v. Bank*, 45 Mo. 528; *City of Kansas v. Swope*, 79 Mo. 446.

Scarritt & Scarritt, for respondent.

The city has power to extend its limits. *City of Westport v. Kansas City*, 103 Mo. 144; Session Acts, 1887, p. 42; City Charter, sec. 4, p. 7. The extension, however, was made in this illegal way, and the territory within the new boundaries was taken within the city and recognized as part of the city and treated as part of the city. As a necessary consequence of the accession of such new territory, the four aldermen com-

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plained of were elected at the general election in 1890 as aldermen of Kansas City from the four wards constituting such new territory. City Charter, sec 5, p. 7; sec. 8, p. 8; sec. 11, p. 9. We claim that under this state of facts they were *de facto* members of the common council of Kansas City, and we are supported in this claim, not only by the highest authority, but by the almost universally announced doctrine of the courts. *Adams v. Lindell*, 5 Mo. App. 197; s. c., 72 Mo. 198; *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409; *Fleming v. Mulhall*, 9 Mo. App. 72; *State ex rel. v. Sutton*, 3 Mo. App. 402; *School District v. State*, 29 Kan. 57; *Brown v. O'Connell*, 36 Conn. 432; 4 Am. Rep. 89.

Gill, J.—The learned trial judge, in a written opinion, thus fully states the nature of this controversy: "This is a proceeding by bill in equity to declare void certain special tax bills issued to the defendant for paving Eleventh street, on the ground that the ordinance authorizing the improvement was not passed by a two-thirds vote of the lower house of the council as required by the charter.

"The final vote on the ordinance in question was taken in the lower house of the council, on September 8, 1890.

"The charter of the city, adopted May 8, 1890, provides that: 'The legislative functions of said city shall be vested in a common council which shall consist of two houses, one to be called the upper and the other the lower house. The lower house shall consist of one member from each ward of the city; provided, however, that the members of the common council of the City of Kansas in office at the time this charter goes into effect shall become and constitute the first lower house of the common council, and shall hold office until the expira-

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tion of the term for which they were respectively elected (art. 2, sec. 1, p. 11); and by article 17, section 42, it is further provided, that: 'There shall be no election of members of the lower house of the common council at the general city election in the year 1890, but the term of office of the members of the common council elected at the general city election in 1889 shall be, and the same is hereby, extended and continued until the general election for city officers, to be held in the year A. D. 1892, and until their successors are elected and qualified.'

"When this charter was adopted there were ten wards in the city, each of which had two members in the council, half of them elected in April, 1888, and the others in April, 1889, for the terms of two years; so, when the new charter was adopted, these twenty members constituted the lower house until April, 1890, when those elected in 1888 went out of office, leaving one from each of the ten wards in 1889, constituting the lower house, and their terms, which were to expire in 1891, were extended by the above provision to April, 1892, until which time they were to constitute the lower house, and there was to be no election of members for that house at the general city election in 1890.

"On December 4, 1889, the council passed an ordinance extending the city limits so as to take in a larger amount of additional territory, which was divided into four additional wards, numbered respectively eleventh, twelfth, thirteenth and fourteenth wards, the original ten wards remaining the same. At the general city election in 1890, each of these wards elected a member of the lower house, and they each qualified and were acting as members of the house when the ordinance in question was voted on, and they were all present and voted for the ordinance. Besides their votes there were only six others who voted for the ordinance, to-wit, the

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members from the second, fourth, fifth, eighth, ninth and tenth wards.

"The ordinance in question provided for paving Eleventh street without a petition of the property-owners, which the charter provides may be done if it be unanimously recommended by the board of public works. 'And the common council shall by ordinance order such work to be done, by the vote of two-thirds of the members elect of each house.' Charter, art. 9, sec. 2, p. 98. 'And if each house shall before or on the day it finally votes on the passage of such ordinance find and declare by a vote of two-thirds of the members elect of each house that such ordinance has been published according to law; that the street is used and occupied for business purposes, and that the work has been unanimously recommended by the board of public works.' Sec. 5.

"The ordinance in question had only six votes in the lower house, unless the votes of those claiming to be members from the eleventh, twelfth, thirteenth and fourteenth wards are counted, and the plaintiff contends that they ought not be counted because as a matter of law the territory composing said wards was never legally brought within the corporate limits of Kansas City, and was subsequently decided by the supreme court in *City of Westport v. Kansas City*, 103 Mo. 141."

From a judgment in defendant's favor plaintiff has appealed.

The point in the case may now be thus stated: Should the ordinance of September 6, 1890 (providing for this street improvement), and of course the tax bills issued thereon, be held void, because there were present, participating in the proceedings of the lower house of the common council, the four members elected from the annexed territory, which annexation was subse-

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quently judicially declared illegal; and but for the votes of these members the ordinance failed of its passage?

The circuit court decided this question for the defendant and declined to decree the tax bills void; and, after a careful consideration of the very able and learned briefs and argument of counsel, we hold that decision correct, and will affirm the judgment. These four councilmen, whose acts are assailed with such force by plaintiff's counsel, though not *de jure* component parts of the city council, must yet, according to controlling authorities, be held officers *de facto*, and their acts as such, in a case like this, be entitled to the same weight as those of officers *de jure.*

The definition of an eminent English judge is often repeated in the books: "An officer *de facto* is no other than he who has the reputation of being such, and yet is not a good officer in point of law." Or, as more fully put by BUTLER, C. J., in perhaps the ablest opinion on the subject in this country: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons." *State v. Carroll,* 38 Conn. 449.

But, contends plaintiff's counsel, in an argument of much logical force, there can be no *officer de facto* unless there exists, to start with, an office *de jure.* And candor compels the admission, that if this case should be forced to determination on the apparent weight of authority—untrammeled by controlling precedents, and regardless too of manifest hardship and injustice—I should, speaking for myself, write here a reversal rather than an affirmance, and that too on the ground just stated.

But the distinction thus urged by plaintiff's coun-

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sel is not, by the latest holding of our supreme court, declared the invariable test. In *Adams v. Lindell*, 5 Mo. App. 197, the St. Louis Court of Appeals in an able and elaborate opinion by HAYDEN, J., attacked the doctrine once announced by Judge DILLON in his work on municipal corporations (vol. 1 [4 Ed.] sec. 276), and held there might be a *de facto officer* where there was not a *de jure office*. And the supreme court, in the same case (72 Mo. 198), not only affirms the decision of the St. Louis court, but expressly adopts its opinion *in toto*. So then this opinion, as it appears in 5 Mo. App., we regard as well that of our supreme court as it is that of the court at St. Louis.

The case of *Adams v. Lindell* was this: Suit on a special tax bill issued in pursuance of an ordinance of the city council of St. Louis after the legal adoption of the new charter (and by which the city council had been abolished), though, at the time the ordinance was passed, it was generally thought—the scheme and charter had been defeated, and the officers of the old municipal government were holding on, as they thought, rightfully. Subsequently, however, it was judicially determined that the scheme and charter had carried, that the new city government was, under the law, the rightful one, and that the council who passed the ordinance for the improvement (and on account of which the tax bill was issued) were then holding offices which in law had been abolished. *Yet* the acts of this council (defunct as it was under the law) were upheld and on the ground too that such acts came under the *de facto* rule, though the office of councilman had been at law abolished. The court, in that case, practically denied the doctrine asserted by Judge DILLON, and which too had been announced in *In re Snyder*, 64 Mo. 58, to-wit, that there could not be in any event a *de facto* officer in the absence of a *de jure* office. In rea-

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soning on the subject the court uses this argumentative language: "Where the office legally exists, and the officer is merely a *de facto* officer, there is a violation of law. The officer not being legally such, his acts are, apart from the principle of validation, of no legal effect; but if to this state of things we superadd the element of non-existence of the office, what essential difference can this make? The question is as to the validity of the acts of a certain man, claiming to be a public officer. If those acts are invalid, they certainly cannot be made more invalid by the addition of another quantity. 'Contrary to law' and 'invalid' do not admit of degrees of comparison. The act of the so-called officer being thus contrary to law (as he has no right to the office) the *de facto* principle is applied, and thus an otherwise void act is validated, *not because of any character or quality attached to the so-called officer or his office*, but because this is necessary to preserve the rights of third persons and keep up the organization of society. The rule is based merely on policy, and its origin and historical development show that it is founded in comparative necessity." The judge further says, that "it is evident that the necessity which creates the rule of validation may exist in precisely the same way and degree *where there is no legal office* as where there is merely *no legal officer;* and it is further evident that to apply the principle to cases where there is no legal office is taking no new or further step; for, as above said, the act being already invalid, it cannot be any more than invalid where there is no legal office. Why, then, should the rule suddenly halt, when both logic and necessity require it to proceed?" The rule is rested rather on the color of right appearing in the acting officer, and not upon any difference between a *de facto* and *de jure* office. The acts of a mere usurper are not validated, for the "apparent circumstances of

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color or reputation leading men to suppose he is a legal officer" do not exist.

While now, as already intimated, I regard *Adams v. Lindell* as an innovation or modification of the rule announced by a majority of the decided cases, I cheerfully advise that it be followed in the determination of the case at hand. Few cases, I imagine, will ever arise where a wise public policy and proper sense of justice will be better served than by adopting the *de facto* rule here. A contrary holding would be most disastrous in its results. If the courts should proclaim the invalidity of all such acts of the city council whilst the same was by the common understanding composed of fourteen members—four more than should have been—by strict legal right, such a course would tend not only to disorganize the municipal government but to seriously wrong those who had taken contracts and expended money on the faith of the apparent condition of things. We are pleased that the law is not so helpless under such difficulties.

Judgment affirmed. All concur.

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F. L. Horn *et al.*, Appellants, v. The Excelsior Springs Company, Respondent.

Kansas City Court of Appeals, January 30, 1893.

1. **Practice Trial:** MOTION IN ARREST: MOTION FOR NEW TRIAL: EFFECT: APPEAL. Judgment went against defendant who moved in arrest, and the judgment was arrested and he discharged. Plaintiff excepted and filed his motion to set aside the judgment and for a new trial, on which no action was taken until the next term, it being carried over without an order of continuance. It was overruled and plaintiff appealed. *Held,* whether a motion for a new trial is a necessary prerequisite to an appeal in such case or not, the appeal was taken in time, and the effect of the motion was to hold the judgment in suspense and to carry the cause over to the succeeding term.

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2. ———: CONTINUANCE. A cause or motion undisposed of goes to the succeeding term, though no formal order of continuance is entered.

3. ———: AFFIRMING JUSTICE'S JUDGMENT: INSUFFICIENT STATEMENT. Plaintiff had judgment before the justice, and, on the same day and more than ten days before the next term of the circuit court, defendant appealed. At said term he failed to appear and prosecute his appeal, whereupon, on plaintiff's motion, the circuit court affirmed the judgment of the justice. Within four days defendant filed his motion in arrest on the ground that the statement did not state a cause of action, which was sustained. *Held*, error, since being in default the defendant cannot question the regularity or sufficiency of the proceeding visiting the statutory penalty upon him.

4. ———: ———: APPEAL. Where the appeal from the justice's judgment is taken on the day of trial which is more than ten days before the next succeeding term of the circuit court, and the appellant fails to prosecute his appeal, the judgment should be affirmed.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED AND REMANDED *(with directions).*

O. A. Lucas and *Stocking & Alexander*, for appellants.

(1) Appellants have followed the proper practice to have the action of the circuit court reviewed. *Bank v. Armstrong*, 92 Mo. 265; *Wolff v. Coffin*, 46 Mo. App. 190. The case was triable at the October term, 1891, of the circuit court, the appeal having been taken upon the day when the justice's judgment was rendered, and more than ten days before the said term began. Revised Statutes, 1889, sec. 6341. The defendant failing to appear to prosecute its appeal, it was the duty of the court to affirm the judgment of the justice, under the express commands of the statute. Revised Statutes, 1889, sec. 2930; *Holloman v. Railroad*, 92 Mo. 284; *Martin v. White*, 11 Mo. 214; *Starr v. Stewart*, 18 Mo. 410; *Milligan v. Dunn*, 19 Mo. 643.

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Karnes, Holmes & Krauthoff, for respondent.

(1) Every appeal must be taken during the term at which the judgment or decision appealed from was rendered. Revised Statutes, 1889, sec. 2248. And, if not so taken, the appeal will be dismissed. *State ex rel. v. Keuchler*, 83 Mo. 193, and cases cited. (2) Motion for new trial was wholly superfluous and unnecessary and without any legal force or effect. The action of the circuit court in overruling motions is reviewed by the appellate court in the absence of a motion for new trial. *Parker v. Waugh*, 34 Mo. 340, 343; *Parker v. Railroad*, 44 Mo. 419; *Bowie v. Kansas City*, 51 Mo. 454, 458; *Frazer v. Roberts*, 32 Mo. 457; *O'Connor v. Koch*, 56 Mo. 253, 262; *Butler v. Lawson*, 72 Mo. 227; *Todd v. Railroad*, 33 Mo. App. 110, 114. Where a petition fails to state a cause of action, no motion for new trial is required to preserve the action of the court in rendering judgment thereon. *Bagby v. Emerson*, 79 Mo. 139; *State to use v. Matson*, 38 Mo. 549; *Hart v. Wire Co.*, 91 Mo. 414. (3) The cases cited by appellants are not applicable to the case at bar. *Bank v. Armstrong*, 92 Mo. 265.

Ellison, J.—This action was begun before a justice of the peace before whom plaintiff obtained judgment. Thereupon, defendant, on the same day, and more than ten days before the succeeding term of the circuit court, appealed the case to such court. At the said succeeding term of the circuit court the defendant failed to appear and prosecute his appeal; whereupon, on motion of the plaintiff, the circuit court affirmed the judgment of the justice. Within four days thereafter defendant appeared in the circuit court and filed his motion in arrest of judgment on the ground that the plaintiff's statement did not state a

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cause of action. This motion was sustained, and the plaintiff, refusing to participate further in the cause, final judgment was rendered against him and discharging defendant. To this action of the court, in sustaining the motion in arrest and in rendering judgment against him, plaintiff excepted, and on the same day filed his motion to set aside the judgment and for a new trial. No action was taken by the court on this motion until the next term, it being carried over, so far as appears, without any order of continuance being entered. At the said next term the motion was overruled, and plaintiff, thereupon, perfected his appeal to this court.

It is now insisted by defendant that plaintiff is not properly in this court, since, as is contended, he did not appeal the cause at the term in which the judgment was rendered against him. It is conceded that an appeal may be taken at the term in which the motion for new trial is disposed of, notwithstanding it be a term subsequent to the trial. But the point made is that, in this case, no motion for new trial was necessary to enable plaintiff to appeal the cause. That, as it was not necessary or warranted by the statute, its finding did not have the effect, as ordinarily, to carry the cause over to the succeeding term when it was acted upon.

We have not been cited to any case bearing directly on the question whether a motion for new trial in cases like the one before us is a necessary step towards an appeal; though we have had several cases pointed out, which bear more or less analogy to the question, in which it is said such motions were not necessary. Upon the other hand, plaintiff cites us to two cases substantially like the one at bar, in which motions for new trial were made and overruled, though the point was not urged or decided. *Iron Mountain Bank v. Armstrong*, 92 Mo. 265; *Wolff v. Coffin*, 46 Mo. App. 190.

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In view of our conclusion as to the point made, it will not be necessary to decide whether a motion for new trial in such cases is a necessary prerequisite to an appeal. Our opinion being that, whether it is or not, if such motion is filed, it becomes a part of the cause, to an extent, sufficient to hold the judgment in suspense until it be determined, and thus to carry the cause with it to a succeeding term. It being a paper in the cause filed within the time allowed by law and upon which the court had jurisdiction to act; and which, in the orderly administration of justice, should be determined before the cause is finally disposed of, we must conclude that it carried the cause with it to the succeeding term.

II. The suggestion was made that there was no order of continuance on either the case or the motion. But the omission of the entry of such order would not have the effect to destroy the court's jurisdiction to act on the motion at the succeeding term. A cause undisposed of will go to the succeeding term, though no formal order of continuance is entered.

III. The remaining question goes to the merit of plaintiff's appeal to this court. It will be borne in mind that the trial court sustained the motion in arrest of its judgment, affirming the judgment of the justice on the ground that plaintiff's statement or complaint filed with the justice was insufficient to entitle him to recover. If plaintiff was legally entitled to have the judgment of the justice affirmed on account of the neglect or failure of the defendant to prosecute its appeal as required by law, as well as by its appeal bond, then it was error to set aside such affirmance on account of the insufficiency of the statement before the justice. This we decided in *Wolff v. Coffin*, 46 Mo. App. 190. If an appellant from a justice of the peace can lie by, in disobedience of the statute and the

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obligation of his bond, and yet, after the statutory penalty is visited upon him for such neglect, come into court and have the regularity or sufficiency of the proceeding (not jurisdictional) adjudicated, he thwarts the statute, and in many cases would obtain the same relief as if he had been diligent. He is asserting rights only allowed to those who prosecute their appeal.

IV. Was plaintiff entitled to have the judgment affirmed? The case was appealed from the justice by defendant on the day judgment was rendered, which was more than ten days before the next succeeding term of the circuit court. This made the cause triable at that term. Revised Statutes, 1889, sec. 6341. If the appealing defendant refuses to appear and prosecute his appeal at such term, the judgment must be affirmed under section 2930 of the same statute. This was expressly decided in *Holloman v. Railroad*, 92 Mo. 284, and *Davis v. Miller*, 35 Mo. App. 253. In the former case, decisions expressing a different view were overruled.

The judgment will be reversed and the cause remanded, with directions that the judgment affirming the judgment of the justice be reinstated and remain in force. All concur.

ROBERT SANDIFER, Respondent, v. GEORGE T. LYNN, Appellant. 52 553 / 85 650

Kansas City Court of Appeals, January 30, 1893.

1. **Negligence:** RAPID DRIVING IN STREET. Driving at the rate of ten miles an hour, in violation of an ordinance, alongside of a street car, and without attempting to check the team when the car is being stopped, is negligence, and a defendant cannot complain of its being submitted to the jury.

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2. ——: CONTRIBUTORY NEGLIGENCE, WHEN JURY QUESTION. Where the act charged to be negligence will admit of different inferences or constructions, it is properly left to the jury, and in view of the rate of speed horses are ordinarily driven in crowded streets, and the control which is usually exercised over them, to determine what precautions are necessary to prevent being run over, is commonly a matter of fact and not of law.

3. ——: ——: ——: VIOLATION OF ORDINANCE. Pedestrians about to enter the streets are not at fault in expecting that the ordinances regulating the speed of a team will be observed.

4. **Principal and Agent:** FACTS CONSTITUTING THE RELATION. Defendant became owner of certain city cab property, and took it to L., a liveryman, and agreed to pay a fixed price for board and the expense of maintenance as well as for care, and wanted him to manage it and look after it, and if possible get the expense of maintenance out of it. *Held,* L. operated the property for defendant and as his superintendent.

5. **Master and Servant:** FACTS CONSTITUTING RELATION FOR THE JURY. Defendant's superintendent did not engage the driver for any definite time. He took the team out of an evening and on return in the morning turned over to the superintendent all the earnings, and at the end of the week he received one-third of what he turned in during the week as compensation. When out he served anyone who chose to hail him. The superintendent could dismiss him at any time and directed when he could or could not take the carriage out. *Held,* it was properly left to the jury to decide whether the driver was defendant's servant or not.

6. ——: ——: INDEPENDENT EMPLOYMENT. Several cases presenting the doctrine of independent employment are distinguished and *Fink v. Furnace Co.*, 82 Mo. 276, and a Pennsylvania case are *held* not applicable to the case the record here discloses.

7. **Evidence:** NEGLIGENT DRIVING IN STREET: ORDINANCE. In action for injuries negligently produced by rapid driving of a team in the street, an ordinance regulating the speed of teams is properly admitted in evidence as bearing on the negligence of the driver and the contributory negligence of the plaintiff.

Appeal from the Jackson Circuit Court.—HON. C. O. TICHENOR, Special Judge.

AFFIRMED.

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M. Campbell, for appellant.

The court erred: (1) In overruling defendant's demurrer to evidence of plaintiff, which affirmatively proved that W. F. Clausen was not employed or controlled by defendant. Shearman & Redfield on Negligence, sec. 73; Cooley on Torts, 532; Bishop on Non-Contract Law, sec. 599; 1 Parsons on Contracts [3 Ed.] pp. 87, 88; The Law of Negligence (Deering), sec. 218; Wood on Master & Servant, sec. 281. And which, affirmatively, by plaintiff's own mouth, showed plaintiff casting himself under the horses' feet. Wharton on Negligence [2 Ed.] sec. 300; Beach on Contributory Negligence, secs. 7, 19; Beach on Contributory Negligence, sec. 162; Deering on Negligence, sec. 12; Shearman & Redfield on Negligence, secs. 25, 34; Bishop on Non-Contract Law, sec. 459; Cooley on Torts, 674; 2 Thompson on Negligence, sec. 3, p. 1148; Pierce on Railroads, 323. (2) By asserting in the first instruction given by the court of its own motion, that, if defendant permitted Litchfield to employ and control the driver, defendant is, without more, liable for that driver's negligent acts, thereby perverting all instructions given. *Corbin v. Mills Co.*, 27 Conn. 274; *Hofer v. Hodge*, 52 Mich. 372; *Stevens v. Armstrong*, 2 Seld. (N. Y.) 493; *Harrison v. Collins*, 86 Pa. 153; *Hale v. Johnson*, 80 Ill. 185; *Mound City Co. v. Conlon*, 92 Mo. 221; *Linday v. Mfg. Co.*, 4 Mo. App. 570. By assuming in the same instruction to determine for the jury the effect and meaning of the mode of payment of the driver—a weighty matter in the determination of the relationship among these parties. *Fink v. Furnace Co.*, 10 Mo. App. 67; *Railroad v. Reese*, 61 Miss. 581; *Arasmith v. Temple*, 11 Ill. App. 39; *Brophy v. Bartlett*, 108 N. Y. 632. (3) By refusing instruction 4, asked by defendant, although employment and

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control of the driver form the only basis of defendant's liability. *Robinson v. Webb*, 11 Bush, 464; *Clapp v. Kemp*, 122 Mass. 481; *Sproul v. Hemingway*, 14 Pick. 1; *Andrews v. Bredecker*, 17 Ill. App. 213; *Boswell v. Land*, 8 Cal. 469; *Fanjoy v. Searles*, 29 Cal. 243; *Norton v. Wiswall*, 26 Barb. 618; *Paulet v. R. & W. R. Co.*, 28 Vt. 297. (4) Clausen was not Lynn's servant; nor is that relationship changed because part of the income of the team was placed to Lynn's credit on expenses. *Wright v. Terry*, 23 Fla. 160. (5) And it was plaintiff's "duty to look along the street to see if it was safe to proceed * * * and plaintiff should have been nonsuited" for neglecting it. *Barker v. Savage*, 45 N. Y. 191; *Cotton v. Wood*, 98 Com. Bench, 568; *Bigelow v. Reed*, 51 Me. 325; *Simons v. Gaynor*, 89 Ind. 165; *Baker v. Pendergast*, 32 Ohio St. 494; *Goshorn v. Smith*, 92 Pa. St. 435. It is an undisputed fact that, but for plaintiff's neglect of this duty, he could not have been hurt, and the court should have declared as asked. *Kelley v. Railroad*, 75 Mo. 138; *Barker v. Railroad*, 98 Mo. 50; *Hudson v. Railroad*, 101 Mo. 13; *Kelley v. Railroad*, 101 Mo. 67; *Boyd v. Railroad*, 105 Mo. 378.

Lyon & Ryland and *Peak & Ball*, for respondent.

(1) The instructions given as to what would constitute the driver a servant of defendant complied exactly with the law, and conformed to the universally recognized tests. *James v. Muehlbach*, 34 Mo. App. 512; *Speed v. Railroad*, 71 Mo. 303; *Annett v. Foster*, 1 Daly (N. Y.) C. P. 502; *Fell v. Mining Co.*, 23 Mo. App. 216, 225. (2) The trial court might well have gone further; and, since the facts are undisputed that the driver was employed by Litchfield, by defendant's authority, to work solely for defendant,

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and the defendant had entire right of control over both Litchfield and the driver, in respect to these carriages, the court would not have erred had it peremptorily instructed that the driver was the servant of defendant. *Hall v. Railroad*, 74 Mo. 298, 302; *Russell v. Ins. Co.*, 55 Mo. 585, 594. (3) It is not the law, and no court ever said it was, that a street car passenger, before stepping from the car at a street crossing, is bound to look both ways along the street in search of recklessly driven vehicles, or be adjudged guilty of negligence. This plaintiff had a right to assume that drivers would comply with the law. He did as all other people do, and the jury, under defendant's instruction 8, found that he was not negligent. *Purtell v. Jordan*, 31 N. E. Rep. (Mass.) 652; *Jetter v. Railroad*, 2 Keyes (N. Y.) 154, cited and approved in *Baker v. Pendergast*, 32 Ohio St. 494; *Williams v. O'Keefe*, 9 Bosw. (N. Y.) 536; *Simmons v. Gaynor*, 89 Ind. 165; *Norton v. Ittner*, 56 Mo. 351; *Petty v. Railroad*, 88 Mo. 306; *Taylor v. Railroad*, 26 Mo. App. 336; *Ridings v. Railroad*, 33 Mo. App. 527; *Mauerman v. Railroad*, 41 Mo. App. 348.

Ellison, J.—This case is for damages arising from personal injuries sustained by the plaintiff and caused by being run over by one of defendant's carriages. The judgment below was for plaintiff, and defendant has brought the case here.

The team was being driven by a hack driver, and one of the principal questions in the case is, was he defendant's servant? There are also two other questions discussed by the respective counsel, viz., negligence of the hack driver, and contributory negligence of the plaintiff. The accident happened, substantially, in this way: Plaintiff was riding on an open "gripcar" of one of the cable car companies of Kansas City, there

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being a regular car attached to the grip. The driver came up alongside of the rear car, going at a rate of speed, which the evidence justifies us in saying, and the jury in finding, was ten miles an hour. The horses, as some of the testimony showed, were going in a lope or gallop. The car was stopped for plaintiff to alight. He stepped off into the street and was almost instantly struck and knocked down by the team. He was facing east while on the car, the car and team both going east. The team, coming up from the west, was behind plaintiff as he sat on the car seat.

That the driver was guilty of negligence, the evidence shows beyond any doubt. He was going at an extraordinary rate of speed, which perhaps would have been negligence any where on the streets of a city, but in this instance he was driving at this rapid rate alongside of a street car of passengers, knowing, as he must have known, of the probability of the car stopping at any moment to permit passengers to alight in the street. Added to this, he made no effort to check the horses as the car was being stopped. His effort, in this respect, being confined, as he states himself, to the moment he discovered plaintiff on the street. His statement on this point is as follows: "The car was running, and I was driving right along by the side of it, and the car stopped and I kept on going, and I never saw anyone getting off the car, and this man got off the car and I couldn't stop in time to keep off of him. The car had stopped. I must have been about the length of the team and carriage—about twelve or fourteen feet—from where the man got off. He had just got off and stepped about two steps off the car when I saw him. The horses were then right onto him.

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"*Q.* Did you halloo to the man when you saw him? *A.* I don't think I did. I pulled on my lines just as hard as I could to stop the team, and hallooed at my horses. Some one on the car did halloo. I did not."

The driver's negligence was submitted to the jury, as a question of fact. If there was any error in this it certainly was not against the complaining defendant.

The contributory negligence of plaintiff was duly and properly submitted to the jury. The distinguished member of the bar who was selected to try this cause could not, nor can we, with any degree of propriety, say, as a matter of law, that plaintiff was guilty of negligence directly contributing to the accident. He had his coat collar turned up and his cap pulled down. His ears were so covered as to, in all probability, obstruct, to a degree, his hearing, though his vision was free. He was looking to the east and saw the way was clear. He did not look back of him to the west before getting off, and had not taken more than a step towards the sidewalk, after getting off, till he was struck. Where the act charged to be negligence will admit of different inferences or constructions, it is properly left to the jury to determine. *Taylor v. Railroad*, 26 Mo. App. 336. We cannot say (considering the nature and place of this accident) that plaintiff's act was accompanied with less care than ordinarily prudent men are accustomed to observe under similar circumstances. Whether a given act is negligent is to be largely determined by the surrounding circumstances as connected with the act. And the same caution and care to avoid a team and carriage on a city highway is not as necessary as to avoid, under the same circumstances, a steam carriage on a railroad highway. Prudent men are accustomed to observe a less degree of care to avoid teams on a city highway than they

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would, under the same circumstances, to avoid cars on a railroad highway. This results from the well-known fact that vehicles on the street are customarily under the immediate command of the driver, and that horses are driven with less speed and under much quicker control than are steam engines. An examination of the case of *Norton v. Ittner*, 56 Mo. 351, will show that Judge NAPTON had such distinction in mind when he wrote the opinion in that case. The distinction was expressly pointed out by the supreme court of Massachusetts in *Purtell v. Jordan*, 31 N. E. Rep. 652, a case in many material respects like the one before us. After referring in this connection to accidents upon railway tracks, the court said: "But, in view of the rate of speed at which horses are ordinarily driven in crowded streets, and the control which is usually exercised over them, to determine what precautions are necessary to prevent being run over is commonly a matter of fact, and not of law."

But there is another distinct justification of the trial court in refusing to say that plaintiff was guilty of contributory negligence. It was clearly shown that the driver was driving his team at an immoderate speed. It was further shown that the city ordinance forbids any other "than a moderate gait." Plaintiff, therefore, was not at fault in expecting that this ordinance would be observed by hackmen. It was not incumbent upon him to expect that this municipal law was to be broken. *Williams v. O'Keefe*, 9 Bosw. 536; *Baker v. Pendergast*, 32 Ohio St. 494; *Simmons v. Gaynor*, 89 Ind. 165. The opposite rule would make it necessary for pedestrians, about to enter upon streets, to be on the alert for all manner of recklessness, even to horse racing. In this instance plaintiff did not see the approach of the team. If he had noticed its

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reckless handling, and yet put himself in its way, a different question would be presented.

This brings us to a consideration of the relation of one Litchfield with defendant. The facts are that defendant came into the ownership of a line of hacks and teams, and that he had no experience in running such business and wished to dispose of them., He placed the outfit with one Litchfield, a livery man in Kansas City, for board and keeping, agreeing to pay him a certain fixed price for the board of the horses and the expense of maintaining the vehicles, as well as a certain price for their care. Litchfield was to operate the line for defendant and to apply the proceeds arising therefrom, less expense of operating, to the board of the horses and keeping up the harness and vehicles. Defendant said that "I wanted him [Litchfield] to manage it and look after it, and if possible get the expense of maintenance out of it." Litchfield stated that defendant came to him and stated that he had come into the possession of property that had formerly belonged to the Kansas City Cab Company, and wanted him to board the horses and take charge of the rigs and to "let them out in the usual manner to the best advantage I could for him." It seems that Litchfield's compensation was included in the price he got for the board of the horses and care of the vehicles. He stated that he had charge and superintendence of the property for defendant. Taking the whole testimony of either defendant or Litchfield separately, or together we think there is no doubt but that Litchfield operated the property for defendant, and as his superintendent. Counsel have emphasized certain expressions of each as showing a different state of case, but these isolated expressions, or, in some instances, expressions of conclusions, do not alter the clear and evident meaning of their whole testimony.

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But the further inquiry remains regarding the status of the driver whose immediate act caused the injury. Litchfield was defendant's agent or superintendent. But did the arrangement with the driver make him so independent of either the defendant or Litchfield as to prevent his being their servant? There was evidence tending to show that the driver was not engaged by Litchfield for any definite time; that he took the team and carriage out of Litchfield's stable of evenings, would run all night and turn in the earnings on each following morning, and at the end of the week he would receive of Litchfield one-third of what he had turned in during the week; this one-third of the earnings was his compensation; when out with the carriage he served anyone he chose who hailed him; that Litchfield could dismiss him at any time he saw fit, and could say when he could, or could not, take out the carriage. Under evidence of the foregoing tendency we are of the opinion that it was proper to submit to the jury, as was done by the court, the question whether the driver was defendant's servant notwithstanding he received a certain share of the earnings of the carriage as his compensation. The driver was not engaged in an independent employment. The carriage and team were furnished and maintained by Litchfield for defendant. The driver's use of the team, the time when he should use it, and the employment itself, were at the pleasure of defendant. For it makes no difference that Litchfield was an intermediary. *Quarman v. Barnett*, 6 M. & W. 508. The money he earned was defendant's money, and he turned it in to defendant on daily reports. The fact that he received, at the end of the week, an amount equal to a third of such earnings, as his compensation, cannot have the effect to destroy the relation of master and servant otherwise established. Nor can we see how the matter is affected by

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the fact that when he was at large in the city he controlled the team and governed his own movements in serving the public. The very necessity of the business in which he was employed would explain and cause that; and, notwithstanding this, he was but the agent and servant of defendant in carrying on the business of operating the carriages into which defendant, as before explained, had embarked. In operating this business it was as necessary to have a driver as it was the carriages themselves, and defendant is as much liable for the negligence of the driver as he would have been for the viciousness of one of his horses or a negligent defect in one of his carriages, had an injury happened by reason of either of these things.

As before stated, the driver was by no means engaged in an independent employment, as was the case of the licensed driver whose servant carelessly drove a bullock through the streets for the owner, in *Milligan v. Wedge*, 12 Adol. & E. 737; and as was the case of the drayman in *DeForrest v. Wright*, 2 Mich. 368; or the truckman in carrying merchandise, as in *McMullen v. Hoyt*, 2 Daly, 271; or yet the jobman who furnished a team and driver to two ladies to be attached to their own carriage, as in *Quarman v. Barnett*, 6 M. & W. 499. A consideration of those cases will show them to be altogether consistent with the position we take on the facts of this case.

Counsel for the defendant has cited us to some cases of which *Fink v. Furnace Co.*, 82 Mo. 276, and *Harrison v. Collins*, 86 Pa. St. 153, may be taken as types. We do not consider that those cases are at all applicable to the case the record here discloses.

The ordinance of Kansas City regulating speed at which vehicles may be driven was properly admitted in evidence as to the driver's negligence, as a violation of such ordinance is negligence *per se*. *Karle v. Railroad*,

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55 Mo. 476; *Bergman v. Railroad*, 88 Mo. 678. And it was furthermore proper, as heretofore shown, as bearing upon the question with the jury as to plaintiff's contributory negligence; since plaintiff, in not looking behind him when about to step off the car, had a right to assume that the city ordinance in regard to reckless driving would be obeyed. *Petty v. Railroad*, 88 Mo. 306.

The instructions refused for defendant were properly refused. Numbers 4 and 5 were evidently meant to convey to the jury the idea that this defendant himself must have hired and controlled the driver as distinguished from his superintendent. Numbers 6 and 7 we believe not to have been justified by the evidence.

We do not discover any error in the trial of the cause justifying our interference with the judgment, and it is accordingly affirmed. All concur.

GEORGE W. KINCAID, Respondent, v. GEORGE J. STORZ, Appellant.

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Kansas City Court of Appeals, January 30, 1893.

1. **Illinois:** COURTS: JURISDICTION. The circuit courts of Illinois are courts of general jurisdiction, and the law there is that nothing shall be intended to be out of the jurisdiction of a superior court but that which especially appears to be so, and nothing shall be within the jurisdiction of an inferior court but that which is expressly alleged.

2. ———: PRACTICE: PLEAS IN BAR AND IN ABATEMENT. Whatever matter of defense shows that plaintiff can have no cause of action must be pleaded in bar; but that which merely defeats the present suit, and does not conclude the plaintiff from maintaining an action upon the cause stated, should be pleaded in abatement. So in a suit brought in the circuit court of an Illinois county, where the defendant does not reside, with process served in the county of his residence, the defendant waives his right to object to the jurisdiction of the court, unless he pleads his non-residency in abatement, and the judgment rendered against him will be valid and binding.

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3. **Judgment:** VALID IN ONE STATE, VALID IN ALL. Under the constitution of the United States, judgments duly authenticated according to the act of congress shall have such faith and credit given them in every court as they have by law or usage in the courts of the state whence such record shall be taken.

4. ———: COLLATERAL ATTACK: JURISDICTION. The record of a judgment of another state does not impart absolute verity, and is not conclusive as to the court's jurisdiction of the subject-matter, or of the person or the thing in proceedings *in rem*.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

AFFIRMED.

F. V. Kander, for appellant.

(1) Storz being a non-resident of Henry county, the court had no jurisdiction to render judgment against him until it found a verdict or rendered judgment against his codefendant, the Henry County Coal Company, it being the local resident defendant through which the court was to obtain jurisdiction of Storz, who resided in Rock Island county. Revised Statutes, Illinois, ch. 110, sec. 2, p. 734. And, since there was no service on the Henry County Coal Company, the court had no jurisdiction to render judgment against Storz. *Christian v. Williams*, 35 Mo. App. 297–308; *Graham v. Ringo*, 67 Mo. 324. (2) There were two defendants in the original action commenced in the Henry county circuit court, and the record does not show what disposition was made of the codefendants of Storz. Every judgment against any joint defendant is irregular until the other is out of the action, and the issues against him disposed of. And it is error to receive and render judgment upon a verdict which does not find the issues as to all the defendants. *Eichelman v. Weiss*, 7 Mo. App. 87; *Schweick-*

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hardt v. St. Louis, 2 Mo. App. 571–583; *Smith v. Rollins*, 25 Mo. 408; *Rush v. Rush*, 19 Mo. 441; *Brown v. Richardson*, 4 Rob. 603; *McMahon v. Turney*, 45 Mo. App. 103. In an action on a judgment against two defendants recovered in another state, only one of whom was served with process, there can be no recovery even against the one served. *Hanley v. Donoghue*, 43 Am. Rep. 554; 59 Md. 239; *Hall v. Williams*, 17 Am. Dec. 356; 6 Pick. 232. (3) In order to entitle a judgment rendered in any court of the United States to the full faith and credit mentioned in the federal constitution and acts of congress, the court must have had jurisdiction, not only of the subject-matter, but of the person. *Latimer v. Railroad*, 43 Mo. 109; *Meyer v. Hartman*, 14 Mo. App. 130. (4) The record of a judgment of another state may be contradicted as to the facts necessary to give the court jurisdiction, and a general denial puts the jurisdictional facts in issue. *Crone v. Dawson*, 19 Mo. App. 214; *Corby v. Wright*, 4 Mo. App. 443, 450; *Eager v. Stover*, 59 Mo. 87–89.

J. W. Gillespie, for respondent.

(1) The circuit courts of the state of Illinois are superior courts of general jurisdiction, and have all the power and jurisdiction of the court of common pleas in England. *Kenney v. Greer*, 13 Ill. 432; *Beaubien v. Brinkerhoff*, 2 Scam. 269; *Wilson v. People*, 94 Ill. 426; *Isett v. Stuart*, 80 Ill. 404; *Myers v. People*, 67 Ill. 503; *Darling v. McDonald*, 101 Ill. 370; *People v. Young*, 72 Ill. 411. (2) The circuit court of Illinois, being a court of general jurisdiction, is presumed to have had jurisdiction of every case adjudicated by it, until the contrary is made to appear. In collateral proceedings, when the record shows, or the court finds, the jurisdictional facts, the record cannot be contra-

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dicted or questioned in a collateral proceeding. *Searle v. Galbraith*, 73 Ill. 269; *Hernandez v. Drake*, 81 Ill. 34; *Harris v. Lester*, 80 Ill. 307; *Fahs v. Darling*, 82 Ill. 142. (3) The federal constitution and acts of congress have given a judgment the same force and effect as evidence, in every other state, that it has in the one where it was rendered. *Horton v. Critchfield*, 18 Ill. 133; *Cheever v. Wilson*, 9 Wall. 108; *Chew v. Brumagen*, 13 Wall. 497; *Mitchell v. Lennox*, 14 Pet. 49; *Ins. Co. v. Harris*, 97 U. S. 331; *Maxwell v. Stuart*, 21 Wall. 71. (4) Where a judgment of a state court in an action against joint defendants, one of whom has not been duly summoned, is by the law of that state valid as to those who are summoned or who appear, it will sustain an action against such defendants in another state. *Hanley v. Donoghue*, 116 U. S. 1; *Lumax v. Clarke*, 52 Mo. 115; *Renaud v. Abbott*, 116 U. S. 277; *Williams v. Hudson*, 93 Mo. 524; *Boyd v. Ellis*, 107 Mo. 394. It is contended by the defendant that the circuit court of Henry county did not have jurisdiction over Storz, because he was served in Rock Island county, and that, as there was no service on the Henry County Coal Company, the court had no jurisdiction to render judgment against Storz. (5) Under sections 2 and 10, chapter 110, of Revised Statutes of Illinois, offered in evidence, all defendants in Illinois, when sued, except in local actions, have the right to be sued in the county in which they reside, or may be found, unless they are sued jointly with some defendant who resides in said county where the suit is commenced, and judgment is rendered against such codefendant. This, however, is not a jurisdictional fact. *Waterman v. Tuttle*, 18 Ill. 292; *Hamilton v. Dewy*, 22 Ill. 420; *Hardy v. Adams*, 48 Ill. 532; *Humphrey v. Phillips*, 57 Ill. 132; *Wallace v. Cox*, 71 Ill. 548; *Railroad v. Williams*, 77 Ill. 354; *Drake v.*

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Drake, 83 Ill. 526; *Stark v. Ratcliff*, 111 Ill. 75; *Gillilan v. Gray*, 14 Ill. 416.

SMITH, P. J.—The plaintiff in his petition alleged that in January, 1883, he recovered judgment against the defendant in the circuit court of the county of Henry, in the state of Illinois, which was a court of general jurisdiction. The defendant put these allegations in issue by the general denial contained in his answer. At the trial, to maintain the issues in his behalf, the plaintiff offered in evidence an authenticated copy of the record of the Illinois court in the case. To the introduction of which the defendant objected upon the ground that the Illinois court pronouncing the judgment was without jurisdiction for the reason that it appears by said record that the suit was begun in said county of Henry by the plaintiff against two defendants, the Henry County Coal Company, a resident of said county of Henry, and the said defendant herein, who was a resident of the county of Rock Island; that it further appears by said record that no summons ever issued in said cause for the defendant, the coal company, nor was there any appearance by the said coal company to the action; that the only party served was the defendant herein, who was served in the county of Rock Island and not in the county where the said action was brought; that the judgment was rendered against the defendant herein alone and not against him and the coal company; and for the further reason that the service of the summons upon defendant was void. The plaintiff to meet these objections introduced in evidence sections 2 and 10 of chapter 110, page 734, Revised Statutes of Illinois, and several decisions of the supreme court of that state (hereinafter cited) construing these statutory provisions. The

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defendant's objections being overruled, exceptions were duly taken thereto. Judgment was given for plaintiff and defendant appealed.

The action which culminated in judgment in the Illinois court was in its nature local. Revised Statutes of Illinois, ch. 80, sec. 16. After the service of the summons the procedure was the same as in actions by attachment. *Bartlett v. Sullivan*, 87 Ill. 219. The circuit courts of Illinois are courts of general jurisdiction and have power to award throughout the state and returnable to the proper county all writs and process which are necessary to the due execution of the powers with which they are vested. *Kenney v. Greer*, 13 Ill. 432; *Champlin v. Morgan*, 18 Ill. 292. In relation to courts of record the law is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so, and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged. The circuit courts of Illinois possess original and unlimited jurisdiction. *Beaubien v. Brinkerhoff*, 2 Scam. 272.

Upon the face of the Illinois record it appears that the defendant was served with process in a county other than that in which the suit was instituted. At the trial of this cause the defendant offered to prove that he was the resident of a county different from that in which the suit was brought, and we must proceed in the consideration of this case upon the theory that the defendant could have proved what he offered. In disposing of this appeal we must regard the defendant as a non-resident of the county where the suit was brought against him. If the defendant, as was the case, was served with summons in a county other than that in which the suit was brought, the jurisdiction of

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the court must be presumed until questioned by a plea in abatement or motion interposed in proper time.

The general rule is that whatever matter of defense shows that plaintiff can have no cause of action must be pleaded in bar; but that which merely defeats the present suit, and does not conclude the plaintiff from maintaining an action upon the cause stated, should be pleaded in abatement. 1 Chitty on Pleadings, 446. If the fact that the suit was brought in a county where the defendant did not reside, and that he was served with summons in the county in which he did reside, had been called to the attention of the court by timely plea in abatement or motion, the only effect of this would have been to defeat that suit and to have compelled the plaintiff to sue where the defendant resided, or to have summons awarded and served on the other defendant who did reside in the county where the suit was brought. *Waterman v. Tuttle*, 18 Ill. 292. These objections being of a dilatory character, and not having been interposed in the time and manner already indicated, must be considered as having been waived. *Gillilan v. Gray*, 14 Ill. 416; *Hardy v. Adams*, 48 Ill. 532. It thus appears according to the statutes of Illinois and the construction placed thereon by the superior court of that state, which were put in evidence in the court below, that the judgment in question is valid in that state.

The act of congress in relation to the authentication of records provides the manner in which the judicial records and proceedings of the courts of any state shall be proved or admitted in any other court within the United States, and that when so authenticated they shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state whence the said records shall be taken. Now since the judgment is valid under

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the laws of Illinois, we are required by the act of congress to accord to it a like validity here.

It is not to be understood from what has been said that the Illinois record imports absolute verity. The rule is that such judgments are as conclusive as domestic judgments, with the exception that they are open to inquiry as to the jurisdiction and notice to the defendant. This doctrine has its foundation in natural justice. The property of no man should be taken from him by judicial sentence, without the privilege of showing, if he can, that the claim against him is unfounded. Want of jurisdiction, it is now held, may be shown either as to the subject-matter or the person or in the proceedings *in rem* as to the thing, although the record may recite facts necessary to give the court jurisdiction. Upon the jurisdictional question the record is subject to be contradicted. *Max v. Fore*, 51 Mo. 75; *Eager v. Stover*, 59 Mo. 88; *Barlow v. Steel*, 65 Mo. 611; *Napton v. Leaton*, 71 Mo. 358. But while a foreign judgment may be impeached by showing that there was no notice, or that appearance by attorney was unauthorized, or perhaps for any other fraud committed against the rights of defendant in the acquisition of jurisdiction of the defendant or his property, yet defendant in this case does not fall within any one of these categories. He was served with notice of the commencement of the suit, though the service was in a county in which it was irregular to have made it; yet as he did not appear and plead this fact in abatement of the suit he must be deemed to have waived the objection. He cannot now call the validity of that judgment in question either in the courts of that state where rendered or in the courts of this state. It is conclusive on him within both jurisdictions.

It results that the judgment of the circuit court must be affirmed. All concur.

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Thomas Riley, Appellant, v. Sparks Bros., Respondents.

Kansas City Court of Appeals, January 30, 1893.

Evidence: EXPERTS: RULE. An expert may give an opinion based on a state of facts he himself has witnessed, or which are detailed to him by other witnesses, or which are put to him in the form of a hypothetical case, and may give his reason therefor. The subject must be one of science or skill, or one which observation and experience has given an opportunity and means of knowledge which exists in reason rather than descriptive facts, and, hence, cannot be intelligently communicated to others not familiar with the subject so as to possess themselves of a full understanding of it. Hypothetical questions must be within the confines of the evidence and pertinent to the theories which the parties are endeavoring to uphold.

Appeal from the Jackson Circuit Court.—Hon. R. H. Field, Judge.

Affirmed.

Geo. F. Ballingal and *Botsford & Williams*, for appellant.

(1) The court erred in permitting question to the witness, Dr. Hersh, and the answer of witness thereto, to go to the jury, because the question does not call for the opinion of the witness as an expert, but calls for his conclusion on the disputed facts in evidence, is not an expert question, and the answer in response to said question is a statement of a fact and not of opinion, and is incompetent, illegal and irrelevant. *Tingley v. Cowgill*, 48 Mo. 297; *Gaslight Co. v. Ins. Co.*, 33 Mo. App. 371; 1 Wharton on Evidence, secs. 440, 452, and cases cited; 1 Greenleaf on Evidence, sec. 440, and cases cited. (2) The court erred in refusing to per-

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mit the witness, Dr. Black, to answer the question because said question was properly an expert question, covering the facts as shown by the evidence, and was competent, legal and pertinent to the issues in the case. *Stonam v. Waldo*, 17 Mo. 498; 7 American & English Encyclopedia of Law, title "expert and opinion evidence," sec. 21, p. 503, and cases cited. The testimony of veterinary surgeons is always admissible. *Pierson v. Hoag*, 47 Barb. (N. Y.) 243; *Pinney v. Cahill*, 48 Mich. 584.

McDougal & Sebree, for respondents.

(1) The question propounded to Dr. Hersh by defendant's counsel was not subject to the objection made to it at the time. (2) The court properly sustained the objection to the question propounded to Dr. Black by plaintiff's counsel.

SMITH, P. J.—This was a suit commenced before a justice of the peace to recover damages for the breach of a contract for the sale of a mule.

The plaintiff's statement alleged two distinct and separable warranties, and the breaches thereof, one that the mule was sound, when in fact he was unsound, having a fatal disease of the lungs, and the other that he was a good worker, when he was not. At the trial the evidence was adduced by the plaintiff to prove, and by the defendant to disprove, the first of the foregoing allegations.

The court by its instructions for the plaintiff very clearly outlined to the jury what constituted a warranty in a case of this kind, and then left it to them to find from the evidence whether or not defendants had warranted the soundness of the mule to the plaintiff, and, if so, whether there had been a breach thereof. Upon

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the issue, whether the defendants had warranted the mule to be a good worker or not, no instruction was given by the court though a number were asked by the plaintiff. Some of these instructions as abstract propositions of law may be correct enough, but there was no evidence offered to support the theory upon which they were based; and, if there had been such evidence adduced, their hypotheses were not within the limits of the issues made by the pleadings in the case. We have been wholly unable after a careful examination of the record to find any evidence tending to prove that the mule was not "a good worker." There is, however, abundant evidence, the tendency of which is to show that the mule did not suit plaintiff, but there is no warranty of that kind alleged in the statement of the plaintiff's cause of action. The statement does not allege that the mule was sold to plaintiff upon condition that it was to suit him or to be satisfactory or to be absolute upon approval. So that the instructions of plaintiff which proceeded upon the theory of a sale upon a condition of that kind were unwarranted and properly refused. The instructions given under the pleadings and evidence were unexceptionable.

The plaintiff complains further of the action of the court in receiving and rejecting certain evidence. The defendant, over the objection of the plaintiff, was permitted to ask Joseph Hersh, who testified that he had been a veterinary surgeon for twenty-five years, whether "if a mule of the age of five or six or even seven years, which had been penned up for several days, say at least five days, and which is in good flesh, is fat, is in such physical condition and spirits and liveliness that it requires two men to catch and hold her, that she is haltered and brought out, showing good spirits, and there is no physical indication in any way of any affliction of any kind, and is led away from the

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stable showing high spirits, whether or not an animal, at that time under those conditions, could be afflicted with lung fever or pleurisy?" In looking at the evidence we find that the assumptions of the question are quite within the limits of the evidence. It appears that the witness showed himself possessed of the proper qualifications. In fact, there was no objection interposed to his testimony on that ground. The rule is that an expert may give an opinion based on a state of facts which he himself has witnessed, or which are detailed to him by other witnesses, or which are put to him in the form of a hypothetical case. And he may state the ground or reasons for the opinion expressed. The general rule to be deduced from the authorities is that the subject must be one of science or skill, or one which observation or experience has given an opportunity and means of knowledge which exist in reason rather than in descriptive facts, and, hence, cannot be intelligently communicated to others not familiar with the subject so as to possess themselves of a full understanding of it. If there is any fact in the case which calls for scientific or professional knowledge or for any peculiar knowledge or experience, or if it is one upon which men of common information are not capable of forming a judgment, it is a case for expert evidence. And the rule further is that, while putting a hypothetical question, facts may be assumed which there is evidence on either side tending to establish, and which are pertinent to the theories which the parties are attempting to uphold. Yet the requirement of this rule, that the fact embraced in the hypothesis in every case stated must be within the confines of the evidence, or the opinion of the witness will be inadmissible, is an unbending one. *Benjamin v. Railroad*, 50 Mo. App. 602; *Goss v. Railroad*, 50 Mo. App. 614. Tested by the foregoing rules

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it is clear that the hypothetical question of the defendant was not subject to objection.

The plaintiff put a hypothetical question to J. B. Black, a veterinary surgeon, who was a graduate of Ontario college, Canada, which was to the effect whether or not, if five or eight hours after the mule was cut open its lungs were found black, his experience would enable him to determine the condition of the mule on the day of the sale, which was the twelfth of the month. The uncontradicted evidence was that on the sixteenth or seventeenth of February the mule was cut up and used by a rendering establishment. *The lungs of the mule then looked black.* They were then thrown in the tank of the rendering establishment. So that there is no evidence whatever of the color or condition of the lungs five or eight hours after the mule was cut up.

The facts assumed by plaintiff's hypothetical case were not within the limits of the evidence, and for that reason, if for no other, the trial court did not err in refusing to allow it to be submitted to the expert witness for his opinion.

We can discover no grounds of error in the record which justify our interference with the judgment which must be affirmed. All concur.

GEORGE POPPERT & SON, Appellants, v. JOHN A. WRIGHT *et al.*, Respondents.

Kansas City Court of Appeals, January 30, 1893.

1. **Mechanics' Lien:** PLEADING: ACCOUNT: VARIANCE. **Materials were furnished for three houses on three contiguous lots at a lumping agreed price of $525. A lien account for the material in one house at a lumping price of $175 was filed. The petition alleged the sale and delivery of all the material at the lumping price, but set out the mis-**

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take in the account and asked the enforcement of the lien for $175. *Held*, the variance between the account sued on and the account set out in the lien paper was fatal.

2. ———: LIEN ACCOUNT GOVERNS: PRIOR INCUMBRANCE. A lienor must stand or fall by the lien which he files, and the dates and items and amounts which he specifies, and is not at liberty to defeat or postpone a prior lien or incumbrance by matter *in pais*.

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

AFFIRMED.

Cook & Gossett, *E. W. Shannon* and *Porterfield & Adams*, for appellants.

The statement of account filed with the lien was a just and true account of the demand due. It should or might have been for more and have been a just and true account of the demand due, but every item in the statement of account filed with and as a part of the lien was furnished and delivered and went into the houses. It was a part of the whole bill and the amount of price set out in it was a part of the price agreed on. It is a simple mathematical or logical proposition that the greater truth includes the lesser. If the whole bill was a just and true account of the demand due, then a bill which by mistake sets out only one-third of four items and all of the other items is *a fortiori* a just and true account of a demand due. The appellants ought not to complain. *Thomas v. Huesman*, 10 Ohio St. 139.

Stuart Carkener, for respondents.

The respondents insist that the court properly rejected the mechanics' lien offered in evidence by

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appellants, because: It did not contain the "just and true account" required by the statute. *Patrick v. Faulk*, 45 Mo. 312. The lien being a mere creature of the statute, it must be complied with, certainly as to the essential of filing a "just and true account." *Foster v. Wulfing*, 20 Mo. App. 85, 90. It is not competent by parol testimony as to the alleged "mistake" to change the lien as filed. *Coe v. Ritter*, 86 Mo. 277; *McWilliams v. Allen*, 45 Mo. 573.

Gill, J.—The plaintiff, under a contract with the defendant Wright, furnished certain lumber and materials for the construction of three houses on contiguous lots owned by said Wright. It was a lumping contract, certain specific items of lumber for the agreed total of $525. Wright failing to pay for the materials when furnished, as agreed, plaintiff filed in the circuit clerk's office his sworn account and statement with a view of securing a mechanics' lien on the three houses. But, in preparing the lien papers, a mistake was made in the account. Some of the lumber that was furnished under the contract was left out of the lien account filed, and in the statement of the agreed price in said lien account $175 was named instead of $525. This mistake, as is gathered from the testimony of Poppert, occurred from some confusion of the bookkeeper in making up the bill of items to be filed along with the lien. Under conflicting orders said bookkeeper first made up the account as for one only of the three houses (assuming likely that separate liens would be filed) in which one-third of the materials was billed; he then seems to have filled out the remaining items as if all the materials were to be mentioned in one account; but the lien account closed with naming one-third of the contract price (or $175) instead of $525, which was the true contract price for all the

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items for the three houses. Still this erroneous account thus made up was filed in the circuit clerk's office, and a mechanics' lien claimed, as for a lumping contract on the three houses on said contiguous lots.

This action was brought alleging the sale and delivery of all the materials—for the three houses—and setting up, too, the agreed lumping price of $525, the petition asking judgment for said sum against defendant Wright, and the charging of a mechanics' lien on the property. But, subsequently, on discovering the error in the mechanics' lien account, plaintiff amended his petition, setting out the mistake, and asked judgment and enforcement of a mechanics' lien for the $175 stated as the amount due in the lien account.

At the trial the court sustained an objection to the lien paper because it was not a just and true account; and the plaintiff, failing to sustain his claim for a mechanics' lien, has appealed to this court. The real contestants on the side of the defense are certain holders of deeds of trust on Wright's real estate thus sought to be charged.

In our opinion the action of the lower court in excluding the lien papers was entirely proper. The paper did not contain that "just and true account of the demand" sued on and for which a mechanics' lien was sought, as is required by the statute. Revised Statutes, 1889, sec. 6709. The account or contract sued on was materially different from the account or contract set out in the lien paper. The items were not the same, nor was the alleged agreed price the same. The account sued on was for certain specified lumber and materials for which a lumping price of $525 was to be paid, while the lien account was for a different lot of materials for an alleged agreed lumping price of $175. The proof shows that the account filed with the petition was the true account; and, as the account filed

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with the lien was materially and substantially different from this, it could not have been the true account. "The lienor must stand or fall by the lien which he files, and the dates and items [and we might say amounts], which he specifies, and is not at liberty to defeat or postpone a prior lien or incumbrance by matter *in pais.*" *Coe v. Ritter*, 86 Mo. 287.

This case is, to a certain extent, an effort to enforce a mechanics' lien against three houses *in solido*, by filing an account of items furnished to one of the houses.

The judgment of the circuit court is affirmed. All concur.

ANDREW H. GARRISON, Respondent, v. JOHN GRAYBILL, Appellant.

Kansas City Court of Appeals, January 30, 1893.

1. **Negligence**: FIRE: THRESHING ENGINE. After a threshing machine had run a short time, fire was communicated from its engine to the plaintiff's stacks. After it was extinguished plaintiff acquiesced in the opinion of the defendant that the machine might be operated with the damper of the engine down, but did not agree to running it with the damper open, nor did he know of the defendant's intention to so operate it. Defendant knew it was dangerous to so operate it during the prevailing high winds, and opened the damper and increased the draught which carried the sparks into the wind and so against plaintiff's stacks. *Held*, he was guilty of gross negligence.

2. ——: ——: INSTRUCTIONS. An instruction presenting the conditions of defendant's liability is summarized in the opinion and approved.

3. ——: CONTRIBUTORY NEGLIGENCE. *Held*, on the facts of this case that plaintiff neither concurred in nor contributed to the negligence which directly caused the destruction of his stacks.

4. **Instructions**: COVERING SAME GROUND. It is not error to refuse instructions covered in others given.

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Appeal from the Daviess Circuit Court.—Hon. Chas. H. S. Goodman, Judge.

Affirmed.

Wm. D. Hamilton, for appellant.

(1) The demurrer offered at the conclusion of plaintiff's evidence should have been sustained on the ground of contributory negligence. *Martin v. Bishop*, 18 N. W. Rep. 337; *Noland v. Shickle*, 69 Mo. 336; *Hogan v. Railroad*, 17 N. W. Rep. 632; *Powell v. Railroad*, 76 Mo. 80. (2) Plaintiff being present and assisting in setting the machine and being present with his hands assisting to thresh when the stack first caught fire and knowing the danger which any man with ordinary sense must have seen at a glance, it was the duty of the plaintiff to refuse to proceed farther with the work at that time, and when he failed to do so he was guilty of such contributory negligence as will prevent his recovery in this case. *Martin v. Bishop*, 18 N. W. Rep. 337; *Hogan v. Railroad*, 17 N. W. Rep. 632. (3) The court erred in giving instruction number 1 on part of plaintiff for the reason that it is contradictory and inconsistent with instructions numbers 1, 2, 3 and 4 given on part of the defendant, and for the reason that it singles out a particular part of the evidence and comments upon it. (4) The court erred in refusing the fifth instruction offered by defendant. *Coats v. Railroad*, 61 Mo. 38; *Kenney v. Railroad*, 80 Mo. 573. (5) The court erred in refusing the sixth instruction offered by defendant. (6) The court erred in refusing the seventh instruction offered by the defendant. *Martin v. Bishop*, 18 N. W. Rep. 337. (7) The court erred in refusing the eighth instruction offered by defendant. *Coats v.*

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Railroad, 61 Mo. 38. (8) The court erred in refusing defendant's ninth instruction. *Martin v. Bishop*, 18 N. W. Rep. 337. (9) The court erred in giving instruction number 1 on its own motion, for the reason that it is a comment on the evidence.

J. F. Harwood and *Alexander & Richardson*, for respondent.

The appellant's defense in this cause is contributory negligence on the part of the plaintiff. If the respondent was guilty of any negligence, it must have been such as directly contributed to the injury in order to absolve the appellant from liability. *Dunkman v. Railroad*, 16 Mo. App. 547–8. The law presumes that the respondent was in the exercise of ordinary care, and this presumption is not overcome by the fact of the injury. Negligence on the part of the respondent must be proven. *Buesching v. Gaslight Co.*, 73 Mo. 219; *Flynn v. Railroad*, 78 Mo. 195. In this case there is no proof that the respondent was guilty of any negligence.

Smith, P. J.—The plaintiff owned several stacks of wheat, rye and oats, and employed the defendant, who owned a steam threshing machine, to thresh the same for him. While engaged in doing the work fire was communicated from the engine to the stacks and they were burned. This action is to recover damages for the loss, on the alleged ground that the fire was the result of the defendant's negligence. The judgment was for plaintiff and the defendant appealed.

The abstract of the record before us discloses that after the machine had been set and had run for some time that fire was communicated from the engine to the plaintiff's stacks, and when the same had been extin-

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guished the plaintiff asked defendant if they had not better quit threshing, and the latter responded that he "did not know" but "that it was mighty windy." After some further conversation the defendant told the plaintiff there would be no danger with the damper of the engine shut down; that the engineer spoke up and said they could not keep the steam up with the damper down. The defendant then said they would thresh as long as the steam lasted and then stop and raise it again. With damper down they went on with the threshing. The machine was running slowly. At this point defendant took several buckets of water and poured them over a stack nearest the engine. Plaintiff was not then present. He had been engaged in loading a wagon with grain and had started away with it. The defendant about this time directed the engineer to open the damper. The motion of the machinery was greatly accelerated. Fire was again communicated to one of the stacks by sparks from the engine. In an instant all the stacks were in flames. The plaintiff, who was then some distance away with his wagon, left it and returned to witness the destruction of his grain stacks. It appears that after the first fire the defendant, without saying a word to anyone, got a pin out of his tool box and a chain from somewhere else and placed them where they would be convenient for use in removing the separator should the stacks take fire.

It thus appears that the plaintiff acquiesced in the opinion of the defendant that the machine could be operated with the damper of the engine down, but it does not appear that he agreed to running it with the damper open, or that he knew that the defendant intended to or did operate it in that way until after the fire. According to the evidence the defendant knew it was dangerous to operate the machine with damper open during the high winds then prevailing

there, and yet with such knowledge, on his own motion and without the consent of the plaintiff, he opened the damper of the engine and thus increased the draught through the smokestack, which carried the sparks out into the wind which blew them against plaintiff's stacks. The defendant must have known the danger of opening the damper, because it appears that he undertook to avoid it by partially wetting the nearest stack to the engine. Not only this, but his apprehensions were such that he provided for the safety of his machinery by procuring and having handy a chain and pin to facilitate the removal of the separator from its close proximity to the stacks, in case they took fire. These precautions were taken without the knowledge of the plaintiff. Resting on the defendant's assurance that the machine could be safely operated with the damper down, he turned his attention to hauling away the grain that had been threshed. It seems to us that under these circumstances the defendant was guilty of the very grossest negligence in operating his machine.

The instructions given for the plaintiff told the jury that if the plaintiff, after the first fire, asked the defendant to quit threshing, and defendant assured plaintiff that there was no danger in running the machine with the damper of the engine down, and with the assurance that it would be run in that way, the plaintiff consented thereto, and the damper was thereupon closed down, and, afterwards, without the knowledge of plaintiff, was opened by order of defendant, and, in consequence of that, the plaintiff's stacks caught fire, they should find for plaintiff, provided they should further believe that a man of ordinary prudence would not have opened the damper under the circumstances. This theory was well supported by the evidence, and was, we think, subject to no objections.

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There was much conflict in the testimony as to whether the plaintiff was present when the machine was set, or whether he directed or assented to setting of it in any particular place. He was unfamiliar with the dangers of operating such a machine. The danger was not a glaring or obvious one. The machine was run some time before it was discovered that danger from fire was likely to result from its operation under the existing conditions. When this was discovered the plaintiff called defendant's attention to the fact, and received the assurance already referred to, which quieted his fears. We cannot discover that the loss of the plaintiff's grain stacks is attributable to any negligence on his part. He neither concurred in nor contributed in any manner to the negligent acts of defendant which directly caused the destruction of his grain stacks by the sparks of fire communicated from the smokestack of defendant's engine. The court gave the defendant four instructions, based upon the defense of contributory negligence, which were exceedingly favorable to him. It refused five others which covered substantially the same ground as those given for him.

The evidence as to whether the defendant's engine was equipped with reasonably safe appliances to prevent the escape of fire was conflicting. This issue was fully covered by the instructions that were given for the defendant. The refused instructions were no more than repetitions of those given, and were for that reason properly refused.

The judgment seems to be for the right party and should be affirmed. All concur.

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ADAM BECRAFT, Appellant, v. GEORGE M. GRIST, Respondent.

Kansas City Court of Appeals, January 30, 1893.

1. **Deceit:** REPRESENTATION OF VENDOR: ACTION. There are three phases in which a case of false representations may appear: *First*, the vendee may be induced to make a purchase relying solely and alone on the false representations of the vendor; *second*, he may be induced to make the investment by the combined false representations of the vendor and certain information received from some other source; or, *third*, although the vendor may have made such false statements, yet the vendee may not trust them and may act alone from information received from such other sources. In the *first* and *second* cases, the vendee is entitled to his action; in the *third* he is not so entitled.

2. **Instructions:** PARTY'S RIGHT TO WHAT KIND. The litigant is entitled to go to the jury on clear and unambiguous declarations of the law, and if he asks such instructions they ought to be given.

Appeal from the Schuyler Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED AND REMANDED.

Edward Higbee, for appellant.

(1) The court erred in refusing instructions 3 and 4 prayed by plaintiff. The land was in a distant state; the representations were for that reason warranties. *Shinnabarger v. Shelton*, 41 Mo. App. 157; Cooley on Torts, 487, 488; *McBeth v. Craddock*, 28 Mo. App. 380, 397. Defendant's false representations need not have been the sole inducement; it is enough if they were a cause—if they operated with other causes to induce plaintiff to make the purchase. *Cahn v. Reid*, 18 Mo. App. 116, 127; *Saunders v. McClintock*, 46 Mo. App. 216, 223. (2) Defendant's fifth instruction was for the same reason erroneous and misleading. *Leeser v.*

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Boekhoff, 33 Mo. App. 223, 237; *Weil v. Schwartz*, 21 Mo. App. 372; *State v. Sivils*, 105 Mo. 530, 534; *State v. Smith*, 53 Mo. 267; *Jones v. Jones*, 57 Mo. 138.

Shelton & Dysart, for respondent.

The refusal of defendant's instructions 3 and 4 was proper. He is not, by their refusal as he contends, denied the benefit of the doctrine that if defendant's misrepresentations in any way contributed as an inducement to plaintiff to make the trade, he is liable, because instructions 1 and 2, given at plaintiff's request, declare exactly the same doctrine. Number 1 reads, "and that plaintiff relied upon said representations believing them to be true and parted with his property." Number 2 reads, "and Becraft traded on the faith thereof," that is, defendant's alleged false and fraudulent representations, in neither case placing defendant's liability upon the fact that plaintiff must have relied solely upon his deceit; hence, plaintiff's refused instructions were mere repetitions or amplifications of a principle clearly presented to the jury in instructions 1 and 2. The case of *Cahn v. Reid*, 18 Mo. App. 115, does not sustain appellant's contention here. *Dunn v. White, Adm'r*, 63 Mo. 181, 186; *Anderson v. McPike*, 86 Mo. 293, 300; Bigelow on Fraud, p. 87. Defendant's fifth instruction neither by its language nor by implication tells the jury to find that plaintiff relied solely upon information obtained from sources other than defendant. It is simply a plain and concise enunciation of the converse of the proposition given to the jury in numbers 1 and 2 given at plaintiff's instance. Appellant's criticism is purely fanciful.

Gill, J.—Plaintiff's action is one for damages, growing out of a trade involving certain lands in Rio

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Grande county, Colorado, charging false and fraudulent representations, upon which plaintiff relied, in the particulars following, to-wit: *First*, as to the distance from the lands in question to the towns of Monte Vista, Alamosa and Parma. *Second*, as to the crop of wheat grown on the land for the year 1890, one-half of which plaintiff claims was to pass to him in the trade. *Third*, as to size and character of the dwelling-house on the land. As to the first complaint damages are laid at $800, second at $250, third at $150. Defendant's answer is first a general denial, and further answering pleads information sought and obtained by plaintiff from sources other than defendant; as to every ground of complaint made by plaintiff, and upon the information so obtained, plaintiff relied alone in making the purchase, and not upon any representation made by the defendant. There was evidence at the trial tending to support either side; there was a verdict and judgment for defendant and plaintiff appealed.

A decision of this appeal rests upon the court's action in the matter of instructions to the jury. There was evidence tending to prove that plaintiff may have acquired information as to the nature and situation of the Colorado farm, both from the defendant's statements to him and from letters written by parties residing in Colorado and near the property. Among others, the plaintiff asked an instruction to the effect that, if plaintiff was induced to make the land purchase through and by both the false and fraudulent representations of defendant and such information as he may have obtained from other sources, even then the plaintiff ought to recover. But the court declined to give this instruction, and gave at defendant's request the following: "5. If the jury believe from the evidence that Becraft sought information from other sources than defendant, by correspondence or otherwise,

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and relied upon that, then the jury should find for the defendant." It is, however, only fair to say that the court gave for plaintiff an instruction to the effect that if defendant made false representations to plaintiff (as to the matters complained of), "and that plaintiff relied upon said representations, believing them to be true," and on that account parted with his money, etc., then plaintiff should recover.

Now there are three phases in which a case of false representations may appear: *First*, the vendee may be induced to make a purchase relying *solely and alone* on the false representations of the vendor; *second*, he may be induced to make the investment by the combined false representations of the vendor and certain information received from some other source; or, *third*, although the vendor may have made such false statements, yet the vendee may not trust them, and he may act alone from the information received from such other sources. In a case involving the facts in the first or second as above stated, the vendee is entitled to maintain an action against the vendor for damages thereby sustained, but in the third supposed state of facts he is not entitled to recover. The reasons therefor are manifest, since in cases numbered first and second the mal-conduct of the vendor is the producing cause, or *one* of the producing causes of the injury inflicted on the defrauded vendee; while in the last or third instance named the vendor's fraudulent act was not in any sense a cause of any damage to the vendee.

With this theory of the law in view, it clearly enough appears that the trial court did not permit the plaintiff to submit his entire case to the jury. He was made to stand or fall on the case first above mentioned, whereas he was entitled as well to have the second phase submitted to the jury. For, if there were two concurring, moving causes, which together induced

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plaintiff to buy the land, and one of these was made up of defendant's false and fraudulent representations, without which the plaintiff would not have acted as he did, then he had a right of action against the defendant for the consequent damages.

It will not do to say that *inferentially* the idea is included in some other instruction. The litigant is entitled to go to the jury on clear and unambiguous declarations of the law. If he asks such instructions they ought to be given. Shrewd counsel could well say to the jury (while commenting on these instructions) that, unless they found that defendant's false representations were *the sole inducement* to plaintiff's purchase of the land, they were bound to return a verdict for defendant.

We conclude then that the court erred in refusing plaintiff's fourth instruction. Though rather awkwardly drafted, it contains a theory of law to which plaintiff was entitled. *Cahn v. Reid*, 18 Mo. App. 115; *Saunders v. McClintock*, 46 Mo. App. 216.

Judgment reversed and cause remanded. All concur.

JENNIE E. ADAMS, Respondent, v. THE QUINCY, OMAHA & KANSAS CITY RAILROAD COMPANY.

Kansas City Court of Appeals, January 30, 1893.

1. **Practice, Appellate:** ADMISSION: INSTRUCTIONS: ABSTRACT. The appellate courts will reverse where an instruction informs the jury that certain facts were admitted, but the abstract shows no such admission.

2. **Railroads:** KILLING STOCK: ENTERING TRACK: PRESENTING CASE. On a retrial the evidence should be presented with greater care so as to show whether the animal entered the track from the public road or not, as in the one case the defendant would be liable, in the other, not.

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Appeal from the Adair Circuit Court.—Hon. Andrew Ellison, Judge.

Reversed and remanded.

F. M. Harrington, for appellant.

The court erred when it told the jury that "it is admitted the animal got on the road where the railroad had no fence." Nor is there any admission that the colt was struck and killed by defendant not within switch limits, nor in any town or village. The record is barren of any such admissions, and it was error for the court to so instruct the jury. Instructions in all cases should be based on evidence, and not on facts of which there is no evidence. *Eli v. Tollman*, 14 Wis. 28; *Hill v. Canfield*, 56 Pa. St. 454; *Machine Co. v. Laymen*, 88 Ill. 29; *Adkins v. Nicholson*, 31 Mo. 488.

John S. McCarty, for respondent.

Ellison, J.—This action was begun before a justice of the peace, and its object is to recover double damages for killing a colt belonging to the plaintiff. Plaintiff recovered before the justice and also on appeal before the circuit court. Defendant has brought the case here.

The plaintiff has filed no brief, and we are thus left to depend upon the brief and abstract which has been presented to us by the defendant. From such abstract it appears that after the close of plaintiff's case defendant demurred to the evidence; that such demurrer was overruled and that thereupon the defendant introduced testimony in its behalf; that at the close of the evidence the court gave instructions for plaintiff, only one appearing to have been offered by defendant, and that was refused.

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Among the instructions for plaintiff, and of which defendant now complains, was the following: "It is admitted the defendant struck and killed the horse in controversy, and that it was not in switch limits nor in any city, town or village, and that at that point the road was not fenced." And also the following: "It is admitted the animal got on the road where the railroad had no fence." To the giving of which instructions defendant excepted. The abstract shows no admissions of any character from defendant. In the absence of anything to the contrary from respondent, we must assume (under our rules) appellant's abstract to be correct.

It might be fairly said that some portions of these admissions were so fully shown by the testimony of each side as to be harmless as incorporated in the instructions. For instance, that defendant's cars struck and killed the animal. But there are other admissions upon which the abstract of the record appears to be entirely silent. We must, therefore, reverse the judgment and remand the cause.

In view of the indefinite way in which the evidence has been preserved, it is proper to suggest that more care and precision ought to be used in presenting it at another trial. The word "crossing" is made to do service, without explanation, for the crossing of the wagon track, for the full width of the public road and for the full space between the fences. So a structure on one side of the road is called a bridge, a cattle-guard, a culvert and a trestle. Except from an expression of one witness, we are not able to say how wide the public road proper was at that point. The case is one, from the circumstances surrounding the accident, particularly the place, which requires some degree of definiteness of statement and precision of language.

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It seems, as near as we can gather, that, at the place of the accident, there is a road crossing, and that at least one of the cattle-guards is further back than the line of the road, leaving a space between the cattle-guards wider than the space allotted for the public road. If the animal entered upon the track from the public road space the defendant is not liable. If it entered from the space outside of the public road defendant is liable. This issue ought easily to be presented in definite shape to the jury.

Reversed and remanded. All concur.

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THE KALAMAZOO NATIONAL BANK, Appellant, v. JESSE CLARK, Respondent.

Kansas City Court of Appeals, January 30, 1893.

1. **Bills and Notes:** AGREEMENT ON BACK. An agreement on the back of a promissory note before signing is not a prior or contemporaneous agreement, but a part of the note.

2. ———: SIGNING ONE CONTRACT FOR ANOTHER: FRAUD: JURY QUESTION. If one intending to bind himself by a written obligation, voluntarily signs what he supposes to be the intended obligation, with full means of ascertaining its true character, of which he fails to avail himself, he cannot be heard to impeach its validity when such instrument turns up as a negotiable promissory note in the hands of a *bona fide* holder, but whether he signed in ignorance through artifice of the payee is a question for the jury.

3. ———: INFIRMITY: NEGLIGENCE. If a party is deceived by reason of some natural infirmity or educational defect, his want of faculties to detect fraud shields him, but if he contributes to the imposition or fails to exercise prudent diligence, he should suffer rather than an innocent holder.

4. ———: ———: ———. The jury in passing upon the negligence of a maker of a note can take into consideration his age, mental power and physical infirmities.

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5. ——: CONTRACT ON BACK: FRAUD. Where a maker signs a note, believing, through the payee's fraud, there is an agreement on the back thereof when there is not, he is no more bound thereby than if it were a total forgery.

Appeal from the Vernon Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED.

Irvin Gordon, for appellant.

(1) The notes being unconditional promises to pay certain sums of money, it was incompetent for the defendant to show a prior or contemporary agreement, not reduced to writing, "that, if the wind mill did not work and give satisfaction, etc., the notes were to be null and void." *Ewing v. Clark*, 8 Mo. App. 570; 76 Mo. 545; *Frissell v. Mayer*, 13 Mo. App. 331; *Henshaw v. Dutton*, 59 Mo. 139; 67 Mo. 666. Where a party voluntarily signs a note, having full and unrestricted means of ascertaining the true character of such instrument before signing the same, but by failure to inform himself of its contents, or by relying on the representations of another as to its contents, signed and delivered a note different in its terms from the one intended to be signed, he cannot be heard to impeach its validity in the hands of a "*bona fide*" holder. *Bank v. Stanley*, 46 Mo. App. 440; *Shirts v. Overjohn*, 60 Mo. 305; *Hamilton v. Marks*, 63 Mo. 167; *Cannon v. Moore*, 17 Mo. App. 92; *Edwards v. Thomas*, 66 Mo. 468.

Burton & Wight for respondent.

(1) Assuming that the defendant actually signed the notes sued upon instructions 6 and 7, taken together, presented the correct law to be applied to the

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facts as shown by testimony in the case. *Shirts v. Overjohn*, 60 Mo. 305; *Frederick v. Clemens*, 60 Mo. 315; *Cannon v. Moore*, 17 Mo. App. 92; *Bank v. Stanley*, 46 Mo. App. 440. (2) An agreement, written on the back of a promissory note before signing, is not a prior or contemporaneous agreement, but a part of the note. Randolph on Commercial Paper, secs. 92, 229.

SMITH, P. J.—This is a suit upon two promissory notes negotiable in form, made by the defendant to the Phillips & Bigelow Wind Mill Company, a manufacturing corporation of the state of Michigan, and by it assigned to the plaintiff, a banking corporation of the same state. It is alleged in the petition that the wind mill company sold and assigned by indorsement thereon in writing said promissory notes before the maturity thereof. The defense interposed by the answer was that of *non est factum*. There was a trial which resulted in judgment for defendant, to reverse which plaintiff appeals.

The errors complained of arise out of the action of the trial court in the giving and refusing of instructions. The plaintiff's first instruction, which was refused by the court, directed the jury that under the pleadings and evidence their verdict must be for it. The determination of the question thus presented imposes upon us the duty to examine the evidence in the case, which tends to establish about these facts: The wind mill company sold the defendant a wind mill, designed for pumping water, which it agreed to and did put up on the latter's farm. Some time after the mill had been put up an agent of the wind mill company met the defendant who was at a neighbor's, about a quarter from his own place, and there asked the latter to give his two notes for the purchase price of the mill. This the latter refused to do, saying, "I don't intend to

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sign the notes until the company makes the mill run." The agent replied that "the company was responsible for whatever they do." The defendant then said, "If you will put that on the note I will sign it, and I will not do it before—that you will make the mill work." The agent then turned over the notes and wrote on the back of them. The defendant asked him to read to him what he had written. He then read: "In case the Phillips & Bigelow Wind Mill Company failed to make the wind mill give satisfaction the notes were to be null and void." The defendant undertook to read the indorsement the agent had made on the notes, but not being a very good scholar and not being able to see on account of the infirmities incident to age, being over seventy-two years old, he could not do it, so he asked the agent to read it for him. The defendant could see there was writing on the back of the notes, but it seems he could not tell what it was. The machine never did work.

The cashier of the plaintiff bank testified that the notes in controversy were purchased by it of the wind mill company before maturity, in the usual way, and in the ordinary course of discount business of the bank.

The notes were produced in evidence and showed an entire absence of the indorsement thereon, which the defendant testified the agent wrote. The defendant does not deny that the signature to the notes is his, but insists that the notes on the face the same as these, which he signed and delivered to the agent of the wind mill company, had the written conditions thereon indorsed, which we have already stated. The question now is whether or not, under this state of facts, the court should declare, as a matter of law, that the plaintiff should recover.

An agreement written on the back of a promissory note before signing is not a prior or contemporaneous

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agreement, but a part of the note. Randolph on Commercial Paper, secs. 92, 229. In *Shirts v. Overjohn*, 60 Mo. 305, it was stated that the result of the best considered cases on this subject may be generally stated to be, that where it appears that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by his failure to inform himself of its contents, or by relying upon the representations of another, as to the contents of the instrument presented for his signature, signed and delivered a negotiable note in lieu of the instrument intended to be signed, he cannot be heard to impeach its validity in the hands of a *bona fide* holder." *Bank v. Stanley*, 46 Mo. App. 440; *Cowgill v. Petifish*, 51 Mo. App. 264.

In *Frederick v. Clemens*, 60 Mo. 313, where the essential facts were similar to those in this case, it was said that it should have been left to the jury to say whether defendant, without negligence on his part, signed the note sued on in ignorance of its true character, through any artifice or fraudulent representations on the part of the payee of the note. But does the rule just stated apply to a cause like this? Here the evidence tends to show that defendant did not have the free and unrestricted means of ascertaining for himself the true character of the instruments before he signed them.

In Daniel on Negotiable Instruments, section 847, it is stated: "The fifth class of cases is that in which some natural infirmity or defect of education has been imposed upon, and the party deceived into signing a note, under the impression that it was for a different

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amount, or was a contracf of a different character. Thus, if a note was fraudulently or falsely read to a blind man, and he were to sign it believing it to have been correctly read, or if a party were unable to read and signed a note after due inquiry and precaution, under the assurance that it was an agreement of a different kind, we should have a new element entering into the consideration of liability. In such cases the want of faculties to detect the fraud shields the party from its consequences. He has created no agency or trust. He has not intentionally or knowingly given appearance of validity to the instrument. It cannot be said that he has acted negligently because his infirmities prevented that diligence which men of ordinary faculties and education possess."

But, by reference to the adjudged cases, it will be seen that this rule is probably not as broad as stated by Mr. Daniel. It has been, in effect, ruled in a number of cases that, when a person of this class has been misled and imposed upon by a stranger, to whom he has delivered a note, and by his own negligence or careless indifference contributes to the imposition, or if, by the exercise of a prudent diligence or regard for his own rights, he might have protected himself, he should suffer rather than the innocent holder of his paper, carelessly issued by him. *Williams v. Stole*, 79 Ind. 80; *Fenton v. Robinson*, 11 N. Y. (4 Hun) 252; *Webb v. Corbin*, 78 Ind. 403; *Greenfield's Estate*, 14 Pa. St. 489; *Walker v. Ebert*, 29 Wis. 194; *Griffiths v. Kellogg*, 39 Wis. 290; *Bowers v. Thompson*, 62 Wis. 480. These cases hold that, where such a party has been guilty of no negligence in affixing his signature, he will be protected against a *bona fide* holder.

It would thus appear that, though defendant was partially blind and illiterate, yet, if by the exercise of a prudent diligence and regard for his own rights, he

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might have protected himself against the fraud and imposition of the agent of the wind mill company, it was his duty to do so; otherwise he will not be protected. *Fusili v. Railroad*, 45 Mo. App. 535. The burden of showing prudence was on him. And whether or not, if the defendant, by the exercise of a prudent regard for his own rights, could have protected himself against the fraud and imposition of the wind mill company, was a question for the jury to determine under all the circumstances in the case.

The evidence in this respect was, it seems to us, quite weak. It does not appear that the defendant called on anyone except the agent to read the indorsement the latter represented he had made on the note. It may have been that the neighbor at or near whose house the notes were signed could, had he been requested so to do, have read the indorsement for the defendant, or it may have been that had he gone to his own house that some member of the family could have done so. The defendant seems to have blindly trusted the whole matter to the integrity of the agent of the wind mill company, who for aught that appears was an entire stranger coming to him from a foreign state. Notwithstanding this, this jury may have concluded that since there was evidence before them tending to show that defendant was a man far advanced in life, who had passed his "three score years and ten" and was "in the sear and yellow leaf," and whose mental powers were bordering on imbecility; whose sense of sight was so dimmed by the infirmities of his great age that he could not see to read or if he could see he would be unable to do so on account of his illiteracy, that he had exercised ordinary care and prudence under the circumstances.

In an action for negligence by an infant of the age of eleven years who did not possess the precaution

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of an adult, it was held that the jury might take into consideration his age and discretion in determining whether he was guilty of contributory negligence. In such case he is only required to exercise care and prudence equal to his capacity. *Donoho v. Iron Works*, 75 Mo. 402; *Duffy v. Railroad*, 19 Mo. App. 380; *Saare v. Railroad*, 20 Mo. App. 211. And it is difficult to see why the jury may not take into consideration the circumstances detailed in the evidence of this case in determining the question whether the defendant exercised ordinary care and watchfulness in the protection of himself against imposition at the time he signed the notes. These circumstances are elements that would naturally enter into the consideration by the jury of the question of negligence.

However all this may be, we cannot say that there was such a lack of evidence of prudence on the part of defendant in the transaction as to warrant the court in giving the plaintiff's peremptory instruction.

The plaintiff further complains of the action of the court in giving two instructions, one for defendant and the other on its own motion, which, in effect, directed the jury that, if defendant signed the notes sued on and delivered the same to the agent of Phillips & Bigelow Wind Mill Company, for said company, and the said Phillips & Bigelow Wind Mill Company, before the maturity of said notes, sold and delivered the same to the plaintiff; and if they further believe that the said plaintiff purchased said notes in good faith, without notice of any irregularity or artifice in procuring the execution of the same, in due course of business, for a valuable consideration, then the jury will find for the plaintiff the amount of the principal and interest, due on said notes, unless they further believe that at the time of signing the notes sued upon said Houston, to whom the notes were delivered, pretended to write,

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and did write, on the back of what purported to be the said notes, and so informed defendant and caused the defendant to believe that he had written on the back of said notes, "that in case the Phillips & Bigelow Wind Mill Company failed to make the wind mill pump, etc., purchased by defendant from said wind mill company, properly work and give satisfaction, these notes are to be null and void," and that defendant signed said notes without fault or negligence on his part, believing and supposing that said notes had such indorsement on their backs, then the notes sued upon were not the notes of the defendant, and you will find for the defendant.

The correctness of the rule announced in these instructions is supported by the authorities everywhere, as will be seen by reference to the fourth edition of Daniel on Negotiable Instruments, sections 847, 848, 849, 849*a*, and the cases there noted.

Upon the facts embraced in the hypothesis of the latter clause of the foregoing instruction which were found by the jury, and which finding is conclusive on us in a case like this, the rule of law is well settled that the defendant is no more bound by the notes than if they were total forgeries including the signatures. *Cline v. Guthrie*, 42 Ind. 227; *Webb v. Corbin*, 78 Ind. 403; *Walker v. Ebert*, 39 Wis. 194; *Nance v. Lary*, 5 Ala. 370; *Taylor v. Atchison*, 54 Ill. 196; *Wait v. Pomeroy*, 20 Mich. 425.

The evidence of the defendant, which was admitted by the court over the objection of plaintiff, but to which no exception was taken, or if so not preserved, we think anyhow was properly admissible under the plea of *non est factum* upon the theory that the notes were a forgery.

The judgment of the circuit court must be affirmed. All concur.

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ISAAC A. BAKER, Respondent, v. THE KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 30, 1893.

1, **Evidence:** IMMATERIAL ANSWER. Though a question be improper, if the witness' answer be immaterial no injury results.

2. ———: CONVERSION: OWNERSHIP OF THIRD PARTY. In an action for conversion, it is immaterial whether a witness, a third party, claim or disclaim the converted property, and his answer to such question tends to prove no issue in the case.

3. ———: PRIMA FACIE CASE. The evidence in this case makes a *prima facie* case and entitles plaintiff to go to the jury.

4. ———: INSTRUCTIONS BASED ON. The jury should be instructed to find from the evidence, but, where those words are omitted from the instructions, they are considered as implied.

5. **Conversion:** PROPERTY ON RAILROAD RIGHT OF WAY: POSSESSION. Defendant's possession of the ties at the time of conversion would in this case defeat plaintiff's action, but being on a railroad right of way, though for future shipment, did not put defendant in possession so as to defeat the action.

6. ———: MEASURE OF DAMAGES. The rule of damages is the value of the property at the time of the conversion with six per cent. interest to the time of trial; but a less specific rule will not reverse where the jury are not misled.

7. **Instructions:** EVIDENCE. An instruction without evidence to support it is properly refused.

8. **Conversion:** PRINCIPAL AND AGENT. Defendant sent out its agents with its tie train to take up the ties it had purchased from one, North, and in doing so they, against the consent of the plaintiff, took up and carried his ties away, and have not returned them. This constituted an unlawful conversion and rendered defendant liable.

Appeal from the St. Clair Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED.

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Wallace Pratt and *J. C. Cravens*, for appellant.

(1) It was error in the trial court to refuse defendant questions of the witness Harrison tending to establish the fact that he, Harrison, was the owner of the ties and not the plaintiff. *Webster v. Heylman*, 11 Mo. 428. There was an entire failure of the evidence to show any liability of defendant in this action. *Callahan v. Warne*, 40 Mo. 131; *Alexander v. Harrison*, 38 Mo. 258; *McFarland v. Bellows*, 49 Mo. 311; *McClanahan v. Schricker*, 45 Mo. 280. (2) The instruction given for the plaintiff is manifestly erroneous, for several reasons. It does not on its face purport to be predicated on the evidence. *Raysdon v. Trumbo*, 52 Mo. 35; *Budd v. Hoffheimer*, 52 Mo. 297; *Givens v. Van Studdiford*, 4 Mo. App. 499; 23 Ill. 416; 77 Ill. 309; 78 Ill. 302. These cases are decisive on this point. (3) This instruction is predicated on the theory alleged in the petition that there was a wrongful taking by the defendant—that is a trespass—when in fact the property was already on defendant's premises, and in its possession as a bailee. There can be no trespass unless the plaintiff is in actual possession of the property. *Pope v. Cordell*, 47 Mo. 251; *Brown v. Carter*, 52 Mo. 46. (4) This instruction fails to state the whole law of the case. There being evidence tending to show that the alleged conversion of the ties was by North through his agent Woods, the instruction should have also included that aspect of the case. *Mansur v. Botts*, 30 Mo. 657; *Sheedy v. Streeter*, 70 Mo. 679; *Fitzgerald v. Hayward*, 50 Mo. 516; *Hoffman v. Parry*, 23 Mo. App. 20. (5) This instruction fails to fix the measure of damages at the value of the property at the time of the alleged conversion. *Carter v. Feland*, 17 Mo. 383. (6) This instruction directs the computation of interest—this is error. *Marshall v.*

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Schricker, 63 Mo. 308; *Dozier v. Jerman*, 30 Mo. 216; *Watson v. Harmon*, 85 Mo. 443; *Egan v. Railroad*, 6 Mo. App. 594. (7) The instruction number 2 asked by defendant should have been given; there was some evidence in support of it. *Ridus v. Elliott*, 29 Mo. 469. (8) There is no evidence that the railroad company ever authorized its servants to do anything more than to load property onto its cars for shipment, that had been placed at their stations and along its line for that purpose. If they went beyond this they exceeded their powers; it not appearing that defendant ever ratified their alleged misconduct, it cannot be held liable in this action. *Smith v. Grove*, 12 Mo. 51; *Johnson v. Strader*, 3 Mo. 359; *Snyder v. Railroad*, 60 Mo. 413; *Sherman v. Railroad*, 72 Mo. 62; *Jackson v. Railroad*, 87 Mo. 422.

Gilbreath & Mann and *John D. Parkinson*, for respondent.

(1) The evidence as a whole undoubtedly entitled plaintiff to go to the jury, and this court will not review the action of the trial court in refusing defendant's demurrer to plaintiff's testimony. *Taylor v. Penquite*, 35 Mo. App. 389; *Bowen v. Railroad*, 95 Mo. 268. (2) The instruction given at the instance of plaintiff was proper. The omission of the words, "from the evidence," in the instruction, is not reversible error. Thompson on Trials, sec. 2318, p. 1674. (3) There was no evidence given of the value of the ties at any time, other than the time at which they were taken, and the failure of the instruction to limit the measure of damages to the value of the ties when taken, could not have operated to defendant's prejudice under the evidence. When an instruction cannot in reality mislead the jury, objection thereto is not well

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founded. *Warson v. McElroy*, 33 Mo. App. 553; *Shinnabarger v. Shelton*, 41 Mo. App. 147. The instruction properly directed the computation of interest. *Kamerick v. Castleman*, 29 Mo. App. 658; *Watson v. Harmon*, 85 Mo. 443. (4) The instruction number 2 asked by defendant was properly refused. There was absolutely no evidence upon which to base it. Defendant's contention that there was no evidence that the railroad company ever authorized its servants in charge of the train to do anything more than load property on its cars for shipment is unfounded. There was sufficient evidence to establish a conversion of the ties by defendant. *Clark v. Craig*, 18 Mo. App. 401. This is defendant's second refused instruction: "2. That if the jury believe that Elisha Wood was on the train that took up the ties, as the agent of North, and superintended the taking of the ties as North's agent, you will find for the defendant."

SMITH, P. J.—This is an action for the wrongful taking and conversion of six hundred and four railway cross-ties. At the trial the undisputed evidence in the case showed that the ties were the property of plaintiff, and had been placed by him on defendant's right of way during the fall and winter of 1887 and 1888, and in the spring of 1888 they were taken up, against the protest of the plaintiff who was present, by a tie train on defendant's road, under the management and control of defendant's agents, and the plaintiff has never been paid for them. The testimony of the witness Wood shows that the tie train which took plaintiff's ties was sent out by defendant, not for the purpose of receiving ties for shipment, but for the purpose of taking up the ties which the defendant had bought of North. It further appears from the evidence that, while the agents and servants of defendant in charge

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of the tie train were taking up the ties of North, without any directions from Wood, the agent of the latter, they also took and carried away the ties of the plaintiff which are the subject of this suit. Wood further testified that he was only present with the train for the purpose of keeping an account of the ties taken which belonged to North; that witness was not consulted about the right to take the ties of anyone. There was evidence that the ties were worth from thirty to thirty-five cents each. There was a judgment for the plaintiff and defendant appealed.

As grounds upon which the judgment should be reversed defendant assigns quite a number of errors committed by the circuit court, which we will notice in the order of their presentation.

I. If it was improper to allow plaintiff's counsel to ask the plaintiff, while testifying as a witness, if he knew whether the cars or engine in the train which he had seen loading his ties had on them the letters K. C., C. & S., no injury resulted to defendant therefrom, since the witness stated that he "could not locate the letters on the cars," meaning, no doubt, that he did not notice them if there were any such.

II. No error is perceived in the action of the court in refusing to allow the witness Harrison to state, in answer to a question asked him by defendant's counsel whether he disclaimed any interest in the ties in controversy. This was wholly immaterial. It was not an issue in the case whether he claimed them or not. His answer did not tend to establish plaintiff's title.

III. The evidence which tended to prove the facts already stated by us was, in our opinion, sufficient to make out a *prima facie* case, and thus entitle plaintiff to go to the jury.

IV. The objection to the plaintiff's instruction that it did not, on its face, purport to be predicated on

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the evidence is well taken, yet no court would reverse a judgment for that reason alone. Thompson on Trials, sec. 2318; *Mathews v. Hamilton*, 23 Ill. 470; *Railroad v. Ingraham*, 77 Ill. 309. The jury should be instructed that they should *find from the evidence* the facts in any case, but where the foregoing italicized words are omitted from an instruction they must be considered as implied.

We need not stop to argue the other objection to the plaintiff's instruction to the effect that, since the undisputed evidence showed the ties in controversy when taken in were in the defendant's right of way that, therefore, they were in its possession as bailee. Of course if the ties were in the defendant's possession as bailee when removed, then the plaintiff was not in the actual possession himself, but we are not willing to hold that a railway company has received and is in the actual possession as bailee of ties, lumber, wood and other materials that may be placed on its right of way along its line for it or for future shipment on its cars. Such is not the law.

The defendant further contends that the plaintiff's instruction is erroneous in that it fails to fix the measure of damages at the value of the property at the time of the caption. The true rule of damage in such cases is the value of the property *at the time of the conversion* with six per cent. interest thereon to the time of the trial. Revised Statutes, 1889, sec. 4430; *State ex rel. Rogers v. Gage Bros. & Co., ante*, p. 464; *Watson v. Harmon*, 85 Mo. 443; *State v. Smith*, 31 Mo. 667; *Spencer v. Vance*, 57 Mo. 427; *Watson v. Bertland*, 21 Mo. 289. The instruction should have been more specific, but looking at the verdict in connection with the evidence, we cannot discover that the jury were misled, or that defendant was in any way prejudiced

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by the omission. *Shinnabarger v. Shelton*, 41 Mo. App. 147.

V. There was no evidence adduced to justify the court in giving the second instruction asked by defendant. The evidence tended to show that Wood was present on the tie train to get an account of such ties only as defendant took belonging to North. He had no further duty to perform. He did not superintend the taking up either the ties of the plaintiff or of anyone else.

VI. And, as to the defendant's final contention that, if the plaintiff's ties were taken by its agents and servants in charge of its tie train, they went beyond the scope of their authority, and were not acting in the course of their employment, and it not appearing that defendant ratified or had knowledge of the action of said agents and servants it ought not to be held liable, it is sufficient to say that the evidence shows that the agents and servants were sent out with a train, or to take up the ties which the defendant had purchased of North, and in doing so they, against the consent of plaintiff, took up and carried the latter's ties away, and have not returned the same. This constituted an unlawful conversion, and rendered defendant liable. *Ireland v. Horseman*, 65 Mo. 511; *Williams v. Wall*, 60 Mo. 318; *Koch v. Branch*, 44 Mo. 543; *Cook v. Craig*, 18 Mo. App. 401.

It seems to us that the judgment is for the right party, and should be affirmed, which is ordered accordingly. All concur

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THE STATE OF MISSOURI, Respondent, v. WILLIAM P. MARTIN *et al.*, Appellants.

Kansas City Court of Appeals, January 30, 1893.

Deadly Weapons: CONSTABLE'S BAILEE: SHOTGUN ARGUMENT. In resisting aggression on one's property the law justifies no greater force than is necessary to the exercise of reasonable and proper judgment to prevent the consummation of the injury, and a constable's bailee is not justified in a rude, angry and threatening exhibition of a shotgun to protect the bailed property without occasion or excuse therefor.

Appeal from the Henry Circuit Court.—HON. JAMES H. LAY, Judge.

AFFIRMED.

E. A. Gracey and *James Parks & Son*, for appellants.

W. E. Owen, for respondent.

SMITH, P. J.—The defendants upon the information of the prosecuting attorney were tried and convicted by the circuit court of Henry county for the crime of exhibiting each in the presence of the other a double-barrel shotgun in a rude, angry and threatening manner. The information is based on the provisions of section 3502, Revised Statutes, 1889, and seems to sufficiently charge an offense under that section.

The evidence preserved by the bill of exceptions tends to show that one Frazier had rented of the defendant Martin a piece of corn land for which he was to pay one-half of the corn that was produced thereon. It further tends to show that, about the time

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the corn was mature and ready for gathering, two suits, one by replevin and the other by attachment, were brought against Frazier before a justice of the peace, and the corn as it stood in the field was taken into the possession of the constable under these writs. The constable engaged the defendant Martin to look after the corn and to report to him any interference with it. It further appears that the replevin suit was discontinued, and then Frazier undertook to gather the corn.

The attachment suit seems then not to have been disposed of in any way. Frazier summoned to his aid three persons, who with their wagons went to the field where the corn was and began to pull it. They had filled one wagon bed with it when the defendants appeared with double-barreled shotguns in their hands, with the triggers cocked, and demanded that Frazier and his men desist from gathering the corn, unload that which was already gathered in the field, and take their departure. This demand Frazier and those with him refused to obey. Martin then repeated his demand, only varying it by telling them to get out "damn quick."

The evidence tends to further show that the defendants were quite angry and offensive in their deportment and language. They held their guns in such a manner as to impress the mind of Frazier and the others with him, that they intended to use them did the latter not obey the orders of the former. The order was implicitly obeyed. The evidence very clearly made out the offense. While there was some little conflict in the evidence, the essential facts were proven without serious contradiction. The defendants seem to have been under the impression that, since they were the constable's bailees of the corn, they were authorized to employ the shotgun in its preservation.

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It does not appear that the defendants made any effort to dissuade Frazier from removing the corn or that they were willing to listen to the reading of a paper which Frazier had received from the plaintiff in the replevin suit. They declared that they would hear no paper read except by an officer. It does not appear that defendants had any knowledge of the contents of the paper.

While perhaps it was the duty of the defendants to protect their bailment, they were not authorized by any law with which we are acquainted to use the "shot-gun argument" in its defense. The defendant Martin had only been requested to notify the constable in case of the interference with the corn. The conduct of the defendants can find no justification in the law. The rule of law is everywhere recognized to be that one, in the defense of his person, relatives or property, must not employ more force than is necessary for that purpose. So in resisting aggression on his property the law justifies no greater force than is necessary in the exercise of a reasonable and proper judgment to prevent the consummation of the injury. 1 Hilliard on Torts, 202, 203; Cooley on Torts, 193; *Hill v. Rogers*, 2 Clarke (Iowa) 67; *Harrison v. Harrison*, 43 Vt. 417; *Drew v. Comstock*, 57 Mich. 116. If defendants had shot and killed Frazier the homicide thus committed would have been neither justifiable nor excusable under our statute. According to the evidence there seems to have been neither occasion nor excuse for the rude, angry and threatening manner in which the defendants exhibited their guns to Frazier and the other persons who were with him. Such unprovoked conduct was calculated to provoke riot and bloodshed.

The instructions, given by the court on its own motion and at the instance of the state and the defendants, fully and fairly presented the law of the whole

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case to the jury, so that there is no reason to complain of the judgment on that account. There was some exception taken to the rulings of the court in the admission and rejection of testimony, but no serious ground for complaint in that regard has been perceived. The defendants having had a fair and impartial trial, according to correct legal principles, there is left to them no just ground for complaint.

The judgment of the circuit court will be affirmed. All concur.

THE CHILLICOTHE SAVINGS ASSOCIATION, Respondent, v. A. D. MORRIS, Appellant.

Kansas City Court of Appeals, January 30, 1893.

Practice, Trial: PLEADING: INDEFINITE ACCOUNT. A petition declared on the balance of an account for $1,500, averring that an itemized statement was thereto attached, but no such statement was attached; defendant demurred on account of that defect, which demurrer the court struck out. Defendant then moved to have the petition and account made more definite, and this motion was overruled, and the defendant declining to plead further judgment was rendered for plaintiff. *Held*, error, as defendant should be informed of the different items that go to make up the account, and had attempted in every way known to the practice to have the defect in the petition properly cured.

Appeal from the Livingston Circuit Court.—HON. B. B. GILL, Special Judge.

REVERSED AND REMANDED (*with directions*).

Davis, Loomis & Davis, for appellant.

(1) The petition does not state a cause of action. It does not set forth the items of the account, nor is a copy thereof attached to the petition or filed therewith. Revised Statutes, sec. 2075; *Graves v. Pierce*, 53 Mo.

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423, 430; *Hassett v. Rust*, 64 Mo. 325, 329; *McWilliams v. Allen*, 45 Mo. 573; *Connor v. Herman*, 44 Mo. App. 346; *Meyer v. McCabe*, 73 Mo. 236, 242; *Meyer v. Chambers*, 68 Mo. 626; *Baker v. Raley*, 18 Mo. App. 562, 567. (2) The appellant's motion to require respondent to make its petition more definite and certain, and to set forth the items of the account sued on in its petition, or to file a copy of said account with said petition should have been sustained. *Meyer v. Chambers, supra; Baker v. Raley, supra.*

L. A. Chapman and *F. Sheetz*, for respondent.

(1) "An account is a detailed statement of mutual demands in the matter of debt and credit, arising out of contract or some fiduciary relation." *McWilliams v. Allen*, 45 Mo. 574; Adjudged Words and Phrases (Winfield), p. 11. An account is a computation or statement of mutual demands, in the matter of debt and credit, arising out of personal property bought or sold, services rendered, materials furnished, and the use of property hired and returned. *McMaster v. Booth*, 4 How. Pr. (N. Y.) 428; Adjudged Words and Phrases (Winfield), p. 11; *Stringham v. Board*, 24 Wis. 299; *Whitwell v. Willard*, 1 Met. (Mass.) 217. (2) No error was committed in overruling defendant's first demurrer unless the general ground of demurrer, that the petition states no cause of action, would reach the failure to file an account or statement in this cause. If this suit was founded on an account, such as contemplated by section 2075, Revised Statutes of Missouri, the failure to file the account would not be reached by this demurrer and was waived. *Meyer v. McCabe*, 73 Mo. 236, 242; *Labadie v. Maguire*, 6 Mo. App. 573; *Kingsland v. Iron Co.*, 29 Mo. App. 534; *Meyer v. Lowell*, 44 Mo. 328. (3) The court

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committed no error in overruling defendant's motion to make plaintiff's petition more definite and certain.

Gill, J.—This is an action on a bank account, alleged to have accrued during the years 1889 and 1890, wherein a balance is claimed of $1,561. The petition charges defendant as one of the partnership of McCormick & Morris, and the amount sued for is alleged to be on account of moneys overdrawn during said years 1889 and 1890—"an itemized statement whereof" was alleged as attached to the petition and made a part thereof. But no itemized account was attached.

The defendant filed several different pleadings, some of which we deem it unnecessary to notice. It is sufficient to say, however, that on October 7, 1891, defendant filed a demurrer to the petition specifically complaining: "*Second.* That said petition fails to set out the items of the account upon which the suit and demand is founded, and does not have attached to or filed with the petition an itemized account of their demand." This was on plaintiff's motion stricken out. Thereupon on the same day defendant moved the court to require plaintiff to make its petition more definite and certain in this, to-wit: "That it set forth in its petition the items of the account therein alleged and sued on, or attached to said petition, referring to it therein, a copy of the account therein alleged and sued on, and upon failure so to do to dismiss said petition." The court overruled this motion; defendant refused to further appear or plead in the cause, and, thereupon, judgment was entered in plaintiff's favor, and defendant appealed.

That this is an action on an account—the items of which should have been set out in the petition, or incorporated in an itemized statement of account

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annexed to and filed therewith; as required by section 2075 of our code of practice—is too plain for argument. The plaintiff's petition was then clearly defective, in that it failed to contain a statement of the items going to make up the alleged cause of action, or, in lieu thereof, to have attached and filed therewith a copy of such itemized account.

The defendant attempted in every way known to our practice to have this defect properly cured, or if not to have the case dismissed; but the court erroneously denied any relief. The wisdom of this statute, which requires such an itemized statement of account, is here most manifest. If this $1,500 balance of account results from the various transactions of the firm of McCormick & Morris (of which defendant was a member) covering a period of two years as alleged, the defendant should be informed of the different items that go to make it up, so that he may determine whether or not he has any good defense to any part of the amount claimed.

The court committed error to the prejudice of the defendant; and its judgment will be reversed and the cause remanded, with directions to sustain the defendant's motion to require plaintiff to make its petition more definite and certain. The other judges concur.

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NAOMI HELM, Respondent, v. C. D. HELM, Defendant; SMITH & STOUGHTON, Interpleaders, Appellants.

Kansas City Court of Appeals, January 30, 1893.

1. **Chattel Mortgages:** STOCK IN TRADE: KEEPING PROCEEDS. If it is agreed between the mortgagor and the mortgagee that the former should sell the mortgaged merchandise in the usual course of trade and keep all the proceeds of such sales for his own use, except enough to pay the mortgagee's debt, the mortgage is fraudulent and void as to creditors.

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2. **Practice, Appellate:** INSTRUCTIONS. Appellant cannot complain of matters conceded to him in his own instructions.

3. **Instructions:** A FACT IN ISSUE. Instructions should not demand a verdict without regard to matter on which the case is built.

4. **Practice, Appellate:** VERDICT BINDS. If the trial court proceed on a correct theory of law, its finding with any evidence to support it binds.

Appeal from the Jasper Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED.

J. W. McAntire and *E. O. Brown*, for appellant.

(1) While it provided that Helm should continue in possession of the mortgaged property until default and continue to sell in usual course of business, yet it required him to deposit the net proceeds of all property sold in First National Bank of Joplin, to the credit of the mortgagees to be paid over to them in satisfaction of the indebtedness thereby secured, and the verbal agreement between Helm and the agent of the mortgagees made on the day of the execution of said mortgage that Helm might use a portion of the proceeds of his daily sales in the payment of lights, fuel or clerk hire and rent of storeroom, did not render the mortgage fraudulent or void as to creditors. *Metzner v. Graham*, 57 Mo. 404; *Hubbell v. Allen*, 90 Mo. 574; *Etheridge v. Sperry*, 11 Sup. Ct. 565; 139 U. S. 266; 19 N. W. Rep. 657; *Fletcher v. Martin*, 25 N. E. Rep. (Ind.) 886; *Bank v. Mercantile Co.*, 25 Pac. Rep. (Kan.) 888; *Havens v. Extein*, 5 N. Y. Sup. 735; *Brass Co. v. G. & Q. Co.*, 37 Mo. App. 154. (2) The trial court erred in the instruction given at plaintiff's instance declaring the mortgage void if given upon more than $3,000 worth of property. It was merely a security, and the rule applicable where the creditor

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takes more than reasonably sufficient in absolute payment does not apply. *Coleman v. Robertson*, 80 Mo. 541; *McKinney v. Wade*, 43 Mo. App. 152; *Metzner v. Graham*, 57 Mo. 405, 409. (3) The agreement between the agent of interpleaders and Helm at the time of the execution of the mortgage whereby Helm should deposit the proceeds of the sales, less expenses, in the bank until a sufficient amount had accumulated to satisfy the mortgage debt did not in the absence of any evidence that interpleaders knew that he was appropriating more than this to his own use, or using the same in the payment of other indebtedness, render the mortgage void. *Brass Co. v. G. & Q. Co.*, 27 Mo. App. 145, 154. Such an agreement in nowise tended to show an appropriation of the property to the use of Helm. *Ephraim v. Kelleher*, 29 Pac. Rep. (Wash.) 985.

Thomas & Hackney and *McReynolds & Halliburton*, for respondent.

The contention of plaintiff at the trial was, and is now, that the mortgagor was permitted to sell all of the mortgaged property, and to convert to his own use the proceeds, and it was competent and relevant for plaintiff to show such an understanding at the time of the execution of the mortgage, and that sales were, in fact, made by the mortgagor, and the proceeds applied to the use and benefit of the mortgagor. *Reed v. Pelletier*, 28 Mo. 173; *State to use v. Tasker*, 31 Mo. 445; *Hisey v. Goodwin*, 90 Mo. 366; *Weber v. Armstrong*, 70 Mo. 221.

Ellison, J.—Plaintiff brought suit by attachment against defendant and attached a stock of merchandise as his property. Interpleaders claimed the goods under a chattel mortgage executed to them containing among others the following provisions:

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"And until default be made as aforesaid, or until such time as the parties of the second part shall deem themselves insecure as aforesaid, the said party of the first part to continue in possession of all the said goods and chattels, in consideration of which he engages they shall be kept in as good condition as the same now are and taken care of at his own proper cost and expense. Any possession said party of the first part may at any time have of the property hereby mortgaged shall only be as the agent of the mortgagees. While the property shall be sold in first party's possession, he shall sell the said property at retail for cash only in the usual course of business unless otherwise expressly authorized by mortgagees, and shall keep a true and correct account of all sales and shall pay the proceeds arising therefrom to the mortgagees to be applied to the payment of the debt hereby secured or to their assigns."

The case resulted below in plaintiff's favor. One declaration was given for plaintiff, and several were given and several were refused for interpleaders. As the cause was tried by the court without the aid of a jury we will not attempt a scrutiny of these declarations except as they may fairly reflect the theory upon which the court disposed of the case. There was evidence which tended to show that, at the time of the execution of the mortgage, it was agreed between the mortgagor and the agent of interpleaders that the mortgage should not be recorded; that the agent told him that he need not comply with the terms of the mortgage; that all the mortgagees wanted was to have the money ready to pay the bill at the maturity of the note, and that the interpleaders would not be hard on him; that the mortgagor told the agent he had some other debts coming due which he would have to pay out of the proceeds of the sales and the agent told him

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all right; that the company would not be tight on him, etc.; that the defendant mortgagor refused to execute the chattel mortgage, because it specified that he should deposit the money in bank to interpleaders' credit, saying that he needed the money to pay incidental expenses; that interpleaders' agent told defendant that paying for gas, fuel, etc., would be all right, but that he could not use the money to pay for or buy goods until the interpleaders were satisfied; that defendant said he would take in more money than necessary to secure the notes before the notes became due, and that the agent answered, "If you get enough money in the bank to secure me, I don't care what you do with the balance of the money."

The evidence further tended to show that between the twenty-fourth day of December and the ninth day of January, defendant Helm continued to sell goods at his boot and shoe store; that during that time he sold between $600 and $800 worth of goods, the sales amounting to about $50 per day; that he paid out of the proceeds of the goods rent, gas bills, fuel bills, clerk hire and a $400 note to T. W. Cunningham, at the bank of Joplin, $150 on a debt due H. Patterson & Co.; that the money was deposited in the bank to his own credit and all checked out by him; that he carried on the business just the same after the execution of the mortgage as he did before; that no money was deposited by him in the Joplin National Bank to the interpleaders' credit; that interpleaders never asked him for an accounting or made any inquiry about his complying with the terms of the chattel mortgage until after the levy of the attachment.

We can by no means agree to interpleaders' construction or interpretation of the declaration of law for plaintiff. It was not declared therein that an extension of time on interpleaders' claim, or the taking of more

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goods in the mortgage than was necessary to secure the debt invalidated the mortgage. These matters were merely by way of recital. The whole substance of the declaration is embodied in these words that if "it was agreed between Richardson [the agent] and Helm that Helm should sell said merchandise in the usual course of trade, and said Helm was to keep all the proceeds of such sales for his own use except enough to pay interpleaders' debt, then said mortgage became fraudulent and void as to other creditors, and the finding should be for plaintiffs." This was a proper declaration and there was evidence upon which to base it.

Interpleaders insist that the agreement, *aliunde* the face of the mortgage, that the mortgagor might remain in possession of the goods and sell in the usual course of trade, provided he deposited the proceeds of the sales to interpleaders' credit, save expenses for fuel, lights, rent, etc., was proper and legal. This was conceded to them by their first declaration given. The declarations refused for interpleaders were none of them fair to plaintiff. They omitted the questions upon which plaintiff builds her case, and demanded a verdict without regard thereto.

It is quite apparent from the record that the trial court had in view the correct legal theory of the case, and, there being evidence in the cause upon which to base it, we must abide by the finding made. We, therefore, affirm the judgment, not believing other suggestions made are of sufficient moment to affect the result. All concur.

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ELIZABETH WYMAN, Respondent, v. SAMUEL HARDWICK, Appellant.

Kansas City Court of Appeals, January 30, 1893.

1. **Injunction: JUDGMENT: APPEAL OR WRIT OF ERROR.** To obtain relief from a judgment by injunction, it should appear that relief could not be had by ordinary legal procedure, as appeal or writ of error; and, where a writ of error is of sufficient efficacy to cure the complaint made in a given case, it should not be displaced by an injunction.

2. ———: ———: ———. Where a petition against a married moman declared on a debt contracted by her during coverture, and asked a judgment and lien on her sole and separate real estate described in the petition, and the judgment was simply a personal judgment, a writ of error would bring up sufficient record to reverse the judgment, and an injunction will not be granted against the enforcement of the judgment by execution, though there were irregularities on the part of the court in ordering the judgment entered, as that no opportunity was given to take exceptions or perfect an appeal.

Appeal from the Clay Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

REVERSED AND DISMISSED.

Hardwicke & Hardwicke, for appellant.

The judgment was a general judgment, and not a special judgment, making the debt a charge on the land. Faucett's petition showed her coverture. If the judgment was wrong, there was only a writ of error required. Having an adequate remedy by writ of error at law, he could not resort to a court of equity. Black on Judgments, secs. 361, 363; *Wilkinson v. Rewey*, 59 Wis. 554; 18 N. W. Rep. 513; *Crandal v. Bacon*, 20 Wis. 639; *Bibend v. Kruetz*, 20 Cal. 109;

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Hart v. Lajaron, 46 Ga. 396. To the same effect is Freeman on Judgments, secs. 485, 486, 487. Having an adequate remedy at law, the injunction should not have been granted. *Damschroeder v. Thias*, 51 Mo. 100.

Karnes, Holmes & Krauthoff, for respondent.

(1) In the absence of a motion for a new trial, and in arrest of judgment, the appellate court will only consider errors apparent on the face of the record. *Bevin v. Powell*, 83 Mo. 365; s. c., 11 Mo. App. 216, 220, and cases cited; *Warner v. Morin*, 13 Mo. 455; *Dobyns v. Rice*, 22 Mo. App. 448; *Erdbruegger v. Meier*, 14 Mo. App. 258; *Biglow v. Railroad*, 48 Mo. 510, 512; *Henry v. Lowe*, 73 Mo. 96, 98; *Fickle v. Railroad*, 54 Mo. 219, 226. In Faucett *v.* Wyman the objection that the judgment was not warranted by the pleadings could not have been urged in an appellate court for the reason that the attention of the circuit court should have been called to it by a motion for a new trial and in arrest. As before stated, Mrs. Wyman was deprived of that opportunity by the action of Judge Dunn. *Bibend v. Kruetz*, 20 Cal. 108, 114; Black on Judgments, sec. 381; *Doan v. Holly*, 27 Mo. 256 (Scott, J.). (2) The obligation of a married woman "is not a lien, or strictly speaking a charge, upon the property, nor does it bind her personally. All that can be said of it is that it is an anomalous obligation, neither binding her nor her estate, general or separate, but only constituting a foundation for a proceeding in equity, by which her separate property may be subjected to its payment, and, until a decree to that effect be rendered, it is neither a lien nor a charge upon the estate." *Davis v. Smith*, 75 Mo. 219, 225; Story on Equity, sec. 1397; *Higgins v. Peltzer*, 49 Mo. 152, 156; *Weil v. Simmons*, 66 Mo. 617. In *Gardner v. Terry*,

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99 Mo. 526, it is said: "Where the facts are such that a court would remove the cloud when cast, it seems clear the court should interfere by injunction to prevent its being cast." *Bank v. Davidson,* 40 Mo. App. 421; Revised Statutes, 1889, sec. 2722. (3) But suppose Mrs. Wyman had never appeared at all to the case of Faucett *v.* Wyman, and allowed judgment to be rendered by default, and the court had rendered the judgment it did. "A personal judgment rendered against a married woman by default, in an action, to which her coverture, if pleaded, would have been a complete defense, is absolutely void." Black on Judgments, sec. 190, and cases cited.

Ellison, J.—This proceeding was begun by a bill for injunction to restrain defendants from enforcing an execution against plaintiff's land lying in Clay county. There was a temporary order granted. It was afterwards made perpetual, and defendants appeal.

The facts are substantially these: Brankin Faucett in his lifetime brought suit in the circuit court of Clay county on a promissory note executed by plaintiff and her husband for the sum of $300. The petition in that case charged that this plaintiff was a married woman, that she was the owner, to her separate use and as her separate property, of certain real estate therein described, and that by signing said note she charged such real estate therewith. The petition contained the usual prayer in such cases, asking that said real estate be charged with a lien for the amount of the note and interest, etc. Before the case was tried, plaintiff's husband, A. W. Wyman, died, leaving plaintiff a *feme sole.* It seems that as a matter of fact the real estate was not Mrs. Wyman's separate property, but was only her general property, held by an ordinary deed. But, notwithstanding this, it seems

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to have been the contention of Faucett, the plaintiff in that case, that notwithstanding the real estate was not her separate property and, therefore, not liable to have a lien established directly against it, yet, since the husband had died, Mrs. Wyman was liable on the note as a *feme sole*, and that the court should render a general personal judgment against her. After considerable delay the court (Judge Dunn) adopted this view; or, at least, rendered a general personal judgment in that case against this plaintiff, the defendant therein. On this judgment a general execution was issued and levied upon plaintiff's lands. It is this execution that plaintiff seeks to enjoin. Her reasons for the injunction are these. She says in substance that in the first place the note being executed by her while a *feme covert*, and not being possessed of any separate property, was a nullity; that the death of her husband afterwards did not impart any vitality to the note, and that no judgment could be lawfully rendered against her. And as a reason for not appealing that case, or taking out a writ of error thereon, she says, substantially, that the cause had been argued before the trial court and taken under advisement; that such court frequently took causes under advisement for more than one term, but that in all such cases it was the *invariable* rule and practice of said court when about to dispose of such a cause to notify the attorneys for both parties that judgment would then be rendered and entered of record; that her attorney, an old practitioner in said court and acquainted with such rule and practice, relied upon its being followed in that case, but that the court, in this instance, departed from such rule and rendered the personal judgment aforesaid against this plaintiff without notifying her or her counsel; that, at the moment of announcing and entering the judgment, her counsel, though in constant and regular attendance at

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court, had stepped out of the courtroom for five or ten minutes on some matter of necessity, and never knew anything of the judgment until after the adjournment of court for the term; that in consequence he could not file a motion for a new trial or in arrest of judgment, or take a bill of exceptions.

In passing on the legal merits of plaintiff's case we will assume in her behalf that the personal judgment should not have been rendered against her on a petition which declared on a note executed by her when *feme covert,* and wherein it was sought to charge her real estate as being her separate property; notwithstanding that at the date of the judgment she had become a *feme sole* by the death of her husband. We shall also assume, in her behalf, that the court had the rule and practice contended for by her, and that, in this instance, the court departed from such rule without notice to plaintiff or her counsel, while she and her counsel were absent from the courtroom; and that neither of them knew the judgment was rendered until the term was adjourned, and thereby were prevented from taking steps necessary to appeal the case or to preserve a bill of exceptions.

When a party seeks relief by injunction from a judgment which has been rendered against him in a court of general and competent jurisdiction, it should appear that he could not have remedied the ills of which he complains by the ordinary legal procedure, as by appeal or writ of error. 1 Black on Judgments, secs. 361, 363; Hilliard on Injunctions, 256, 257; 1 High on Injunctions, secs. 165, 173, 174. The right to a writ of error is not *per se* a bar to an injunction against a judgment or execution (*Parker v. Judges*, 12 Wheat. 561), for such writ may not, in some cases cannot, embrace the causes on which the equities

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have arisen. But, if the writ is of *sufficient efficacy* to cure the complaint made in a given case, it should not be displaced by an injunction.

But plaintiff contends that she could not appeal since she had no opportunity of taking a bill of exceptions or filing a motion for a new trial. And that, while she could have sued out a writ of error, yet such writ would not have sufficed for her relief, since only the record proper could have been reviewed on such writ, in an appellate tribunal. Conceding these propositions (except the efficacy of the writ) we are left to ascertain what relief she could have had from the showing made by the record proper. The petition and the judgment in that case were a part of the record proper and would, therefore, have been brought up by a writ of error. From these, all the facts necessary to entitle Mrs. Wyman to relief in an appellate court appear in plain terms. The petition itself, containing the complaint against her, shows that at the time she executed the note she was a married woman and it seeks only a special judgment against property described and therein alleged to be her separate estate. In short, the petition states a case in which there could not, properly, be a general judgment rendered against her. Therefore, when the judgment in the record discloses itself to be a general personal judgment, it is made plain that it is not supported by the petition and would, in consequence, be set aside by a revisory tribunal. Plaintiff, therefore, had a full and adequate remedy in the ordinary course of legal procedure, and must fail in her injunction proceeding. The judgment will be reversed and the bill dismissed. All concur.

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FAIRBANKS, MARSH & Co., Appellants, v. THE CRESCENT ELEVATOR COMPANY, Respondent. 52 627 88 21

Kansas City Court of Appeals, January 30, 1893.

1. **Mechanics' Lien:** DESCRIPTION OF PREMISES. The description of property to be affected by a mechanics' lien need not be perfect, but only sufficiently so to enable a party familiar with the locality to identify the premises with reasonable certainty; and a description, "on forty-three-hundredths of an acre seven hundred and thirty-five feet north of the center of the section, being a portion of ten acres purchased of R., belonging to C. and having C.'s elevator on it," is sufficient, and is not vitiated by the mistake in the distance from the center of the section.

2. ———: DESCRIPTION OF PREMISES GRANTED: RULE. Where there are certain premises once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not vitiate the grant.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED AND REMANDED.

Kagy & Bremermann, for appellants.

(1) The pleadings and lien papers describe the land as definitely as the statute requires, or so near as to identify the same, and the declaration of the court to the contrary was erroneous and in conflict with the statute itself, as well as the adjudications under it. Revised Statutes, 1889, sec. 6709; *Dent v. Smith*, 63 Mo. 263; *Bradish v. James*, 83 Mo. 313; *Brown v. Wright*, 25 Mo. App. 54, and cases cited; *Rall Bros. v. McCrary*, 45 Mo. App. 365. (2) Though the description of the premises is not such as the statute requires between a

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stranger and contractor, it is good between the parties to the contract. The owner of the land and buildings into which appellants' property went is in no position, as against the materialman, to say the description is too indefinite. *Rall Bros. v. McCrary*, 45 Mo. App. 365, and cases cited. (3) Two monuments are given, the center of section 27 and the Crescent elevator building. The rule is well settled that courses and distances yield to fixed monuments, and, while the description calls for seven hundred and thirty-five, the line, nevertheless, runs to the Crescent elevator building. *Shelton v. Heatherly*, 16 Mo. 124; Tiedeman on Real Property, sec. 839. (4) The petition describes the land as that purchased by elevator company from Albert Ross. This description would be definite enough to convey the title, under the principle that "black acre" or "white acre" would be sufficient, as said by such lawyers as Blackstone and Kent.

Trimble & Braley, for respondent.

(1) The description of the building and the land upon which the lien is sought, as contained in the lien account filed with the clerk, is not "a true description of the property, or so near as to identify the same." He must give a description of the building and must give the boundaries of the land which he seeks to cover, or must so describe the land that from his description its boundaries can be certainly located. Jones on Liens, sec. 1422; *Munger v. Green*, 20 Ind. 38; *Iron Works v. Dorman*, 78 Ala. 218; *Tuttle v. Howe*, 14 Minn. 145–151; *Matlock v. Lane*, 32 Mo. 262; *Williams v. Porter*, 51 Mo. 441; *Wright v. Beardsly*, 69 Mo. 548; *Ranson v. Sheehan*, 78 Mo. 668. (2) The use to be made of the description after he gives it is to enable anyone interested in the property to see what he claims, and to

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enable the court to have something definite before it so that it can make a definite order of sale; so that the sheriff may advertise the property by a correct description, and make a deed which will convey title. Jones on Liens, sec. 1422; *Iron Works v. Dorman*, 78 Ala. 218; *Leenly v. Iron Co.*, 65 Mo. 545. (3) The description of the land, besides being insufficient, is mostly untrue. (4) In this case the plaintiff seeks a lien against both a building and a lot of land. A failure to give a true description of the land, or so near as to identify it in its lien account, constitutes a failure to acquire any lien either on house or land. No lien attaches unless the statutory requirements as to the contents of the lien account be all complied with. *Williams v. Porter*, 51 Mo. 441; *Wright v. Beardsly*, 69 Mo. 548; *Ranson v. Sheehan*, 78 Mo. 673.

GILL, J.—The Keystone Iron Works Company contracted with the defendant to put in the Crescent elevator certain machinery and improvements; and the Keystone Company sublet a portion of the work to the plaintiff, who, failing to get their pay, brought this action for the enforcement of a mechanics' lien against the elevator building and the land on which the same was situated. On the trial before the court, the enforcement of the lien was denied on the alleged ground that the elevator property was not sufficiently described in the lien papers. From a judgment in favor of the Crescent Elevator Company, and discharging its property from the lien, the plaintiff appealed.

The lien was sought for work and labor done and materials furnished by the plaintiff, "upon, to and for the buildings and improvements described as follows, to-wit: The elevator building situated on the following described premises, to-wit: On forty-three-hundredths of an acre of ground, seven hundred and thirty-five feet

north of the center of section twenty-seven (27), township fifty (50), range thirty-three (33), being portion of the ten-acre (10) tract purchased of Albert Ross, all in Kansas City, Jackson county, Missouri, being the same land on which the Crescent elevator is situated. Said premises, buildings and improvements, belonging to and being owned by the Crescent Elevator Company, * * * the said account being hereby filed in order to constitute a lien upon the buildings, improvements and premises above described," etc. The evidence showed that in East Kansas City, defendant purchased from Albert Ross, out of a ten-acre tract belonging to him, a piece of real estate measuring forty-three-hundredths of an acre, and erected thereon the building known as the Crescent elevator, with its name upon its side; that this was the only elevator in that vicinity; and that the said lot or piece of land was just seven hundred and fifty-five feet north of the center of said section 27, township 50, range 33.

The statute requires "a true description of the property, *or so near as to identify the same.*" Revised Statutes, 1889, sec. 6709. While now we do not have here an absolutely perfect description of this elevator property, is it not *so near* a correct description as to identify the same with reasonable certainty? We think so. As said in *De Witt v. Smith,* 63 Mo. 265: "If there appear enough in the description to enable a party, familiar with the locality, to identify the premises with reasonable certainty, to the exclusion of others, it will be sufficient." "There is great reluctance," says WAGNER, J., "to set aside a mechanics' claim merely for loose description, as the acts generally contemplated that the claimants should prepare their own papers, and it is not necessary that the description should be either full or precise. It is enough that the description points out and indicates the premises so that, by apply-

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ing it to the land, it can be found and identified." To same effect see, also, Phillips on Mechanics' Liens [2 Ed.] secs. 379, 381, 382, 383; 2 Jones on Liens, sec. 1421.

While the description contained in the lien papers, now under review, is somewhat clumsily expressed, there are yet certain discriminating marks set out that would indubitably lead one familiar with the locality to understand what particular piece of real estate was intended by the lienor. The charge is for a mechanics' lien against a lot or tract of land of *forty-three-hundredths* acres purchased by the Crescent Elevator Company of Albert Ross, and in section 27, township 50, range 33, in Kansas City, Jackson county, Missouri; it is designated as the same lot on which is situated a well-known elevator, the "Crescent," but the said *forty-three-hundredths* acres is said to lie *seven hundred and thirty-five feet* north of the center of said section 27, when the proof shows the exact distance is *seven hundred and fifty-five feet* north of the center of said section. However, when the whole description is considered together, there is no difficulty in locating the property, and correctly, too. The other matters of description so clearly identify the property that it will not be vitiated by this slight error of seven hundred and thirty-five instead of seven hundred and fifty-five feet. "Where there are certain premises once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not vitiate the grant." *Brown v. Gas Co.*, 16 Wis. 556; *Brown v. Wright*, 25 Mo. App. 58; Phillips on Mechanics' Liens, sec. 283.

Judgment reversed and cause remanded. All concur.

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H. L. LEAVEL, Respondent, v. JOHN PORTER, Appellant.

Kansas City Court of Appeals, January 30, 1893.

1. **Principal and Surety:** SURETY'S LIABILITY. The court approves the following findings of law in the referee's report in this case:

   (1) The sureties on the bond of a contractor for his faithful performance of a building contract are liable for his failure to comply with his contract in his leaving unpaid material bills, and for the cost of finishing the work left incomplete, and for the liquidated damages for overtime required to complete the building.

   (2) Any change in the contract without the surety's consent releases him, and his liability cannot be extended by implication or liberal intendment.

   (3) Surety cannot take advantage of his principal's wrong and make that an excuse for his release, which the bond says shall be the reason of his liability.

   (4) The contract called for the construction of a two-story and attic frame dwelling with cistern, etc., and made the specifications, etc., part of the contract; the bond for the faithful performance of the contract required the construction and completion of a two-story and attic building as provided for in the contract; the sureties are bound by everything contained in the specifications, etc., including cistern, etc.

   (5) A building contract provided that seventy-five per cent. of the contract price should be paid on weekly estimates of the architect, and the remainder was retained until the building was completed and accepted, and satisfactory evidence was furnished that no claims existed against the building. *Held*, such evidence was not required on the weekly payments, and only on the final.

2. **Referee's Report:** FINDING OF FACTS. The finding of a referee on the issues of fact is regarded in the same light as a special verdict of a jury, and is not disturbed where there is substantial evidence to support it.

3. **Practice, Trial:** REFERENCE. The trial court was authorized by statute to refer this case.

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4. **Judgment:** ON BOND: HARMLESS ERROR. While a judgment on a bond in form should be for the full penalty, with execution for the damages, yet this error does no harm and is not reversible.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

AFFIRMED.

M. Campbell, for appellant.

W. Calvin Wells and *S. F. Johnson*, for respondent.

GILL, J.—This case was tried before Ben. T. Hardin, Esq., as referee, and I know of no better statement of the controversy than to give the substance of his findings, of both law and fact, as reported by him to the circuit court.

"On the fifteenth day of June, 1889, plaintiff and Alonzo P. Johnson entered into a written contract, by the terms and conditions of which Johnson was to well and sufficiently, in a careful, skilful and workmanlike manner, build and complete one two-story and attic frame building, according to the plans and specifications made and furnished by W. W. Polk, architect, and under his supervision, on the southeast corner of Thirteenth street and Bales avenue, Kansas City, Missouri, to furnish all materials and labor therefor, and to finish the same on or before the fifteenth day of September, 1889, to the satisfaction and under the direction of said W. W. Polk, to be testified by a writing or certificate under his hand, etc.

"In consideration thereof, plaintiff Leavel was to pay $2,158, payable in the following manner: 'Seventy-five per cent. of the value of the labor, work and materials actually put into the building, to be paid to the party of the first part [Johnson] by the party of

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the second part [Leavel] on Saturday of each week, as the work progresses, to be paid only on the certificate of Mr. Polk, architect, certifying to the value of the work and materials so put into said building.

" 'Provided, however, that the remaining twenty-five per cent. of the contract price be reserved by the party of the second part until the building is completed and accepted by the owner.

" 'Provided, further, that there shall be satisfactory evidence that there shall then be no claims then existing against said building for labor or materials done on, or used in, the construction of the same.

" 'Provided that in all cases the said party of the first part [Johnson] before he shall be entitled to demand or receive payment for the work, or any part thereof done under this contract, shall produce unto the said party of the second part [Leavel] a writing or certificate under the hand of said W. W. Polk, the architect above named, to the purport and effect that the materials furnished, and the work done by the said party of the first part, are in accordance with the plans, drawings and specifications above referred to, and of the respective provisions hereof.

" 'Provided, further, before final acceptance of the building when completed, a certificate shall be obtained by the contractor, from the clerk of the office where liens are secured, etc., that no liens are recorded against said building; neither shall there be any legal or lawful claims against the contractor, in any manner, from any source whatever, for work or materials furnished on said works.'

"The contract also contains the following: 'And it is hereby further agreed that the plans, specifications and drawings above referred to are hereby made and shall be considered and construed to be a part of this contract.

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"By the terms of the contract, the architect may, at his discretion, reject any work or materials and has power to have any work altered at the expense of the contractor.'

"The plaintiff Leavel had power to make all alterations by adding to, or omitting, or deviating from the plans, drawings and specifications which he shall deem proper, and the architect shall advise, 'without in any manner impairing the validity and virtue hereof.' In such case the architect should appraise such alteration, and add to or deduct from the contract price, as the case might be.

"If Johnson should, during the progress of the work, become bankrupt, refuse or neglect to supply a deficiency of materials or workmen, Leavel should have power to supply the same after one day's notice in writing should be given to Johnson; and in such case the costs of such work and materials should be retained by Leavel as liquidated damages, and Leavel should not be accountable to Johnson in any way 'for the manner in which he may have had the work completed.'

"On the reverse side of said contract, and on the same date thereof, is a bond entered into by A. P. Johnson, as principal, and John Porter and D. F. Sullivan as sureties, conditioned that if the said Alonzo P. Johnson 'shall duly perform said contract' the bond to be void, etc. The contract proper simply calls for the building of a two-story and attic frame building according to the plans and specifications. But the plans, drawings and specifications, which are expressly made a part of the contract, call for privy, walk and cistern.

"It is also provided in the contract that, 'for each day the building remained unfinished after the time

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that it was agreed that it should be completed, the liquidated damages shall be $10 per day.'

"The plans, drawings and specifications were to be construed and interpreted by Polk, the architect, and he was to have absolute control, and the iron-clad contract makes his will the law throughout. If any differences should arise between the parties to the contract, the decision of the architect above named shall be final and binding on all the parties hereto.

"Polk prepared the plans, specifications and drawings; the contract and bond were executed and accepted. There were some changes made during the progress of the work, in the wainscoting in the bath room, moving closet, changing a partition, one door, and some other minor changes, no notice of which was given to Sullivan and Porter. But no changes were ordered by Leavel. They were made by Polk and Johnson. No change was ever made in the contract, bond, plans, drawings or specifications. Leavel never consented to any delay in the completion of the building. A closet was moved by a foreman of Johnson on his own responsibility, Leavel acquiescing in the move.

"I also find that during the progress of the work Polk, in accordance with the terms of the contract, made written certificates of the value of the work and materials, upon which, on the following dates, were paid to Johnson by Leavel the following amounts * * * in the aggregate the total of $1,499.50, paid on the contract price, as called for by Johnson, as shown by the certificates issued by Polk. The amount of each payment was estimated by taking total estimate of work, deducting twenty-five per cent., and then deduct the total sum of all prior payments. This was done in accordance with the terms of the contract, and I find from the evidence that, at the time these payments were made, no claims were existing against

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Johnson on account of material furnished for said work. Polk looked after the construction of the work and ascertained that the labor and material had entered into the building before issuing the certificates above mentioned.

"I further find from the evidence that Johnson never completed the building, but abandoned the same a short time before finishing it, and the three defendants were notified by Polk, in writing, that it was not finished according to the contract, and that Polk, the architect for Leavel, after more than one day's notice in writing to defendants, employed men and purchased materials to complete the work, on account of which Leavel was compelled to pay out the following sums, as shown by items mentioned in plaintiff's petition: * * * making a total of $1,106.66 which, added to the $1,499.50, paid out to Johnson on Polk's certificates, makes $2,606.16. From the whole amount thus paid out by Leavel, I deduct the contract price of $2,158, which leaves the amount that Leavel was compelled to pay over and above the contract price, by reason of Johnson's not having complied with his contract, $448.16.

"I further find from the evidence that the building was not completed on September 15, 1889, as the contract provided, and, although plaintiff claims for thirty days' overtime at $10 per day, the evidence of the architect shows that he charged for fifteen days' overtime and claimed for that much at $10 per day amounting to $150, which I find from the evidence plaintiff is entitled as liquidated damages, in accordance with the terms of his contract, and I accordingly allow it.

"I further find that the plans, drawings, and specifications enter into and form a part of the contract between Johnson and Leavel the same as though they were copied into said contract *verbatim*.

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"I further find from the contract attached to the petition, and admitted in evidence, a clause containing the following language originally in print; *provided further*, that in each case (referring to the clause just preceding it, in regard to Johnson collecting seventy-five cent. of the price of the work on Polk's certificate) a certificate shall be obtained by the contractor, etc., that no liens exist, etc., 'neither shall there be any legal claims against the contractor in any manner,' etc. The parties, before signing the contract, scratched out the words 'that in each case,' and inserted in lieu thereof the following, 'before final acceptance of said building when completed,' which changed the whole meaning of the clause. As it was originally, such certificate from the recorder would have to be produced by Johnson before each payment made on Polk's certificates. And the last part meant, 'neither shall there be any legal claims against the contractor,' etc., when such payments were made on Polk's certificates of the work done. But as the first clause of the proviso was changed to require Johnson to produce the recorder's certificate as to liens, etc., before final acceptance of the building when completed, and the second clause referred to the first, it necessarily and most effectually changed the meaning of the second clause, so that it means 'neither shall there be any legal claims against the contractor when the building is completed and accepted.' There is no escape from this construction. Hence, I find that all money paid to Johnson by Leavel, viz., $1; 499.50, was paid in strict compliance with the contract, and that Leavel could not hold each partial payment until Johnson would produce the recorder's certificate as to liens, as claimed by defendant's counsel. My finding is the same in regard to Stoelzing's bill of $154.48, which takes its place alongside the other partial payments on Polk's certificates, and is gov-

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erned by the same facts and by the same laws, and that all of said payments constituting the $1,499.50 were made to Johnson when, by the terms of the contract, they were made payable, and no other claims against the building were in existence. And the Stoelzing bill and judgments were themselves claims against the building, which Leavel was legally bound to pay. And in the written part of the contract, where are mentioned the terms of payment, the contract recites that twenty-five per cent. of the contract price shall be reserved 'until the building is completed and accepted by the owner.' And the proviso is that there shall be satisfactory evidence that there shall then be no claims existing, etc. Thus showing most conclusively that Johnson was to produce evidence of non-existence of claims, etc., only at the completion of the building, and not when partial payments were made, as contended for by defendants' counsel.

"The $448.16, which the plaintiff paid over the contract price, added to the $150 for overtime amounts to $598.16, for which I find for plaintiff, as the evidence shows that he performed the contract on his part so far as he was not prevented by the acts of Johnson. And I also find that any changes made in the work during its progress in no way increased the difficulty or expense, nor in any manner tended to delay the work embraced in the contract, plans, drawings and specifications agreed upon between Johnson and Leavel, none of which were ever changed, or in any manner altered. As conclusions of law from the above facts I find:

"I. There is no question as to the liability of Johnson for the amount found as a result of his failure to comply with his contract. The material bills were his debts, and Leavel was bound to pay them off, as a valid claim against his house. So with

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the bills for finishing the work. And he is liable for the $150 liquidated damages. *Morse v. Rathburn*, 42 Mo. 594.

"II. It is insisted by counsel for sureties that the contract for the faithful performance of which their bond was given was changed so as to release said sureties. Any change in a contract made after a surety signs it or signs a bond for a faithful compliance with the contract will release the surety, and this, also, whether it be detrimental or beneficial to the surety, if the change be made without his consent. The liability of a surety is not to be extended by implication beyond the strict terms of the contract. To the extent, and in the manner and under the circumstances pointed out in his obligation he is bound and no further.

"He is the favorite of the law. There is to be no construction nor equity against sureties, and their liability is to be limited to the exact letter of their bond, and by no liberal intendment shall a surety's liability be carried in the smallest degree beyond the very terms of his undertaking, and no moral obligation is superadded to his legal obligation. If he is not liable in the strict letter of the law, he is not liable at all. The reason upon which this rule is founded is, that the surety has never made the contract upon which it is sought to charge him. His answer, if it is sought to charge him upon the altered contract, is that he never made any such bargain; and if upon the original contract, that such contract no longer exists, having been legally terminated by the altered or substituted contract made by the parties. In either contingency the answer furnishes a complete defense. This is the law everywhere.

"But I am at loss to see how this rule is to aid defendant sureties. There is not a scintilla of testimony in this case that the contract, plans, specifica-

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tions, drawings or bond were ever, in the most remote degree, altered or changed after defendants executed the bond. It is true, some little variations were made in the original design of the house during the progress of the work, but not in any of the written instruments. And this, indeed, was provided for in the contract itself. But there is no evidence to show that Leavel had anything to do with changing the work, and, if Johnson failed to do the work according to the contract, this of itself was a breach of the bond, for which his sureties are liable. There is a vast difference between Johnson and Leavel changing the contract without the consent of the sureties, and Johnson's failure to do the work according to the contract. In the one case, the sureties would be discharged; in the other, firmly bound, for it is so nominated in the bond. The fact that Johnson did extra work, or work not in the manner mentioned in the contract, did not impose additional burdens on the sureties; nor did it change or alter their attitude in reference to their obligation to Leavel, if the contract was not changed. If Johnson did extra work, or varied his work from the original design, and did not thereby increase the difficulty or expense of the structure, nor delay the work embraced in the contract which was left unchanged, the sureties are bound.

"In cases cited by defendants, one of which is *Warden v. Ryan*, 37 Mo. App. 467, the contract had been altered. Not so in this case. In the case of *Ryan v. Morton*, 65 Tex. 258, the contractor who was principal in the bond and the owner made a new contract for two galleries, and the price of the work was not included in the original contract price. The work was done upon the same building, and was independent of the first contract. It was held that it

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did not operate to release the sureties on the bond given for the faithful performance of the original contract.

"There is no evidence in this case of any changes authorized by plaintiff. There were minor departures, however, by Johnson, the contractor, with the advice of Polk, the architect; but they are specifically provided for in the contract. And to allow the sureties to escape liability because of such departures, without first complying with the contract wherein it provides for such departures, shall be first stated in writing by the owner with the certificate of the architect indorsed thereon, would be to allow them to take advantage of the wrong of the contractor, and make that an excuse for their release, which the bond says shall be the reason of their liability; and that, too, when plaintiff had nothing to do with the wrong, if any, done by the contractor.

"It is also urged by defendants, Porter and Sullivan, that the real contract called for 'two-story and attic frame dwelling-house, together with one cistern, one privy and one privy vault, and also the necessary walks around and about the house and yard,' and, further, that the bond was given, conditioned to be void, if Johnson shall, for $2,158, execute, construct and complete a two-story and attic building as provided by a written contract for that purpose, dated June 15, 1889, and that, therefore, said bond is not security for the fulfillment by Johnson of the contract he undertook. The things to be done, in addition to the dwelling, are mentioned in the plans and specifications, and the contract specifically says that the plans, specifications and drawings are made, and shall be considered and construed, to be a part of this contract. The sureties are just as much bound by everything contained in these plans, specifications and drawings as if

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they had been copied *verbatim et literatim* into the contract. No citation of authorities is needed on that proposition.

"The sureties had the contract before them when they signed the bond which is on the reverse side of the contract. In law, they had all before them for which the contract called.

"It is further insisted by counsel for the sureties that there should have been satisfactory evidence that there were at each particular payment no claims then existing against said building for labor or materials done on or used in the construction of the same. The provision of the contract governing that is as follows: 'Provided, however, that the remaining twenty-five per cent. of the contract price be reserved by the party of the second part until the building is completed and accepted by the owner. Provided, further, that there shall be satisfactory evidence that there shall then be no claims then existing against said building for labor or materials done on or used in the construction of the same.' There is no room for doubt as to the meaning of this language. It simply refers to the time when the building is completed and accepted, that such 'satisfactory evidence' is to be produced that no claims exist against the property, and not to the weekly payments of seventy-five per cent of the price of the work then done on the house. Any other construction would be torture of the language used. That was a written provision in a printed form of contract, and the parties themselves evidently placed the same construction upon that clause, for following that written provision is a printed one just following the clause providing for weekly partial payments of seventy-five per cent. to be made by Leavel on Polk's certificate as follows: 'Provided, further, before final acceptance of said building when completed, a certificate shall be

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obtained by the contractor, from the clerk of the office where liens are recorded, and signed and sealed by said clerk that he has carefully examined the records and finds no liens or claims recorded against said works, or on account of said contractor; neither shall there be any legal or lawful claims against the contractor, in any manner, from any source whatever, for work or materials on said works.'

"The above paragraph is an exact copy as it stands in the contract. It originally read that, 'in each case' of a weekly partial payment, a certificate shall be obtained by the contractor that no liens were of record against the property. As if to give force to the preceding written clause, and to make this clause conform in meaning to the former, the parties scratched out the words, 'in each case,' and wrote in lieu thereof the words, 'before final acceptance, of said building when completed.' I make the copy in print and write the words added so as to show the paragraph as the parties left it.

"Now counsel for defendants contend that the last clause in that paragraph, 'neither shall there be any legal claim,' etc, refers to the weekly payments. But, if he will resurrect his Kirkham, he will find that the second clause of said paragraph refers to and modifies the first and means, 'neither (at the final acceptance of said building when completed) shall there be any legal or lawful claims against the contractors,' etc. That construction brings this paragraph into harmony with the written one preceding it wherein it is provided that the remaining twenty-five per cent. of the contract price 'be reserved until the building is completed and accepted by the owner,' and that there be satisfactory evidence that then no claims exist, etc.

"If defendants' contention be right, the sureties would not be liable for the reason that the $1,499.50

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paid to Johnson by Leavel would more than cover the amount sued for in this case, and, being the primary security for the due performance of the contract, should have been withheld, and the sureties should have the benefit of it. *Taylor v. Jeter*, 23 Mo. 244, and other cases cited by defendants' counsel in his brief.

"But I am unable to agree with him as to the facts in the case. If, in this case, the evidence had disclosed the fact that Leavel paid the money to Johnson, either when by the terms of the contract it was not payable, or that the money was paid to Johnson with the notice of existing claims against the building, then the contention of the defendants would find some support in the case of *Taylor v. Jeter*, 23 Mo. 244. Same case cited and followed in *Ryan v. Morton*, 65 Tex. 262. To the same effect is the case of *Watkins v. Pierce*, 10 Mo. App. 595. But the evidence abundantly establishes that all these payments were made to Johnson, when, by the terms of the contract, they were payable, and it is not shown that at the dates of the payments any lien claims were filed, or that any such claims existed. In such case the principle of law in *Casey v. Gum*, 29 Mo. App. 14, *loc. cit.* 25, governs.

"Other points have been raised, but I think the foregoing sufficiently disposes of the case, and I, therefore, recommend that judgment be rendered in favor of plaintiff against all of the defendants, in the sum of $598.16, the amount found to be due. And all the papers, exhibits, evidence and other proceedings and reports are herewith returned to the court, as witness my hand this twelfth day of October, 1891.

"BEN T. HARDIN,
"Referee."

To the foregoing referee's report, the defendant sureties filed exceptions, which, on being heard by the court, were overruled; judgment was entered as sug-

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gested in said report, and defendant Porter has appealed.

We have gone over the numerous objections to this judgment urged by defendants' counsel, and find in none of them any substantial reason for complaint. The referee in his report has not only given a full and clear finding of facts, but has as well substantially announced the law applicable to the case.

Much of the counsel's brief is taken up with complaints as to the referee's finding of facts. As well understood in cases of this kind, we regard the referee's finding on the issues of fact in the same light as a special verdict of a jury, and we will not, therefore, disturb the same where there is substantial evidence to support it. Having reviewed the entire evidence contained in this record, we discover no just cause to set aside the respective findings of fact on any of the issues.

The trial court, too, was authorized by the statute to refer the case. Revised Statutes, 1889, sec. 2138. And, while the judgment in form should have been for the full penalty of the bond, with execution ordered for the amount of plaintiff's damages, yet this error does no harm to defendant—is a mere barren technicality, and for which alone we do not feel warranted in reversing the judgment.

The judgment, therefore, of the circuit court will be affirmed. All concur.

JAMES R. CARVER, Defendant in Error, v. GEORGE P. SWAN *et al.*, Plaintiffs in Error.

Kansas City Court of Appeals, January 30, 1893.

Practice, Appellate: BILL OF EXCEPTIONS: MOTIONS: AFFIDAVIT, ETC.: WAIVER. Where no bill of exceptions is taken, the appellate court cannot notice matters in the shape of motions, affidavits, etc., and errors in the trial court in dealing with such matters are waived by failure to preserve exceptions.

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Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

AFFIRMED.

H. Winston, for plaintiffs in error.

Hatch & Middlebrook, for defendant in error.

PER CURIAM.—This action was begun before a justice of the peace in 1887. There was a judgment for plaintiff and defendant afterwards appealed to the circuit court. The plaintiff entered his appearance in that court on the second day of the first term following the appeal. In November, 1888, the case was dismissed for want of prosecution. The plaintiff on the same day filed a motion to reinstate the case. It seems this motion was not disposed of until July, 1890, when the dismissal was set aside and the cause reinstated. During the time the case was thus held on this motion, it was not placed upon the docket for the intervening terms. The case being reinstated was docketed for trial at the January term, 1891, when the defendant failing to appear to prosecute his appeal from the justice, the judgment of the justice was affirmed. Defendant, during that term, filed his motion to set aside the judgment of affirmance and to strike the case from the docket. The judgment was set aside but the cause was not struck from the docket. The cause was for trial at the following April term, and defendant again not appearing, the judgment was affirmed. Again the judgment of affirmance was set aside, on defendant's motion. At the next term plaintiff filed an amended statement or petition. And defendant, again not appearing, a judgment was rendered against him after a hearing, as is said. Again defendant filed his motion to set aside the judgment and in arrest of

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judgment. These the court overruled. Defendant has sued out this writ of error, *but he took no bill of exceptions* to any of the actions of the trial court; and from this omission we have nothing before us but the record proper. *Monroe City v. Finks*, 40 Mo. App. 369. We cannot find anything in the record proper wherewith to assail the judgment of the trial court. There is a mass of matter presented to us in the shape of motions, affidavits, etc., which we cannot notice as they were matters of error to be saved by a bill of exceptions, so as to become a part of the record.

The justice of the peace, before whom the action was instituted, had jurisdiction of such action, conceding it to have been defectively or imperfectly stated. The circuit court obtained the jurisdiction by reason of an appeal regularly taken, and in the state of the case as made its judgment for plaintiff must stand. Whatever errors, if any, were committed against defendant, they have all been waived by a failure to preserve them by exceptions.

We have given a careful consideration to defendant's suggestions, but find that, under the condition of the record, they are not well grounded. We will, therefore, affirm the judgment.

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JOHN H. TOWNER, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 30, 1893.

1. **Negligence:** UNCOUPLING CARS: CONTRIBUTORY NEGLIGENCE: BRAKEMAN AS CONDUCTOR. In the absence of the conductor, the brakeman was in charge of a train engaged in switching near a switch-head, and the train was moved on his signals. After setting the cars in motion and observing their rate of speed, he made one attempt to uncouple and desisted, and then, without ordering or signaling a slowing up, again attempted to uncouple when he knew that to do so involved

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the necessity of his going with the cars at their rate of speed. There was no emergency or necessity existing requiring such action. He was killed, and his body was found on one of the main rails about fifty or sixty feet from where he entered the track. *Held:*—

(1) He was guilty of contributory negligence such as to defeat a recovery by his representative though there was evidence tending to show his foot was caught in the unblocked place between the guard and the main rail.

(2) Whether he could or could not readily and quickly pull the coupling pin is immaterial, as, in either event, he was guilty of negligence in remaining between the cars going at such rate for such distance and until he reached the guardrail.

2. ———: SPEED OF TRAIN: ORDER: RULES. The question of negligence in any particular case must be governed by the facts and circumstances which pertain to the case as made, and the facts that deceased regulated the speed of the train by his orders, and in violation of the rules of the company went between the moving cars, are elements of contributory negligence. *(Waldhier Case,* 87 Mo. 37, *and other cases distinguished.)*

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

REVERSED.

Elijah Robinson, for appellant.

The plaintiff was guilty of contributory negligence in going between cars while they were in motion. *Williams v. Railroad,* 43 Iowa, 396; *Marsh v. Railroad,* 56 Ga. 274.

Albert Young and *W. A. Alderson,* for respondent.

Instructions 1, 2 and 4 declared the law in the exact language of the supreme court in the leading "guardrail case" of this state, instructions 1 and 2 being copied from that case. *Huhn v. Railroad,* 92 Mo. 440; *Soeder v. Railroad,* 100 Mo. 673–682.

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Ellison, J.—This action was instituted by plaintiff as the minor son of his deceased father who was killed by being run over by one of defendant's engines attached to a freight train and engaged in switching at the Harrisonville station. Deceased was an employe of defendant engaged as a brakeman on the train which killed him, and at the time was attempting to *uncouple* cars. The judgment below was for plaintiff.

Since the result of our investigation of this case is to dispose of it on the contributory negligence set up in defendant's answer we will not notice other matters discussed at the argument. The negligence charged against defendant in the petition is the failure to block the "guardrail" on defendant's track at the point where it had a siding or switch, and where deceased met his death. The testimony showed quite conclusively that blocking the guardrail made the track safer for the use of employes, and that the track without the blocking at such places was more dangerous for the use of employes. It also appears established that, in the absence of the conductor of a freight train engaged in switching, the brakeman is in charge of the movements of the train; that the engineer looks to him for orders or signals as to movements; that such engineer will obey the brakeman's order or his signals. It also appears that in this instance the conductor was absent from the train having gone into the depot at some little distance off, and that deceased was directing the switching. It appears that wishing to cut off some cars it became necessary to uncouple them, and that he signaled the fireman (then in charge of the engine) to back up; that thereupon the fireman began to move the cars back at a rate of speed of between four and six miles per hour, and deceased went in between the cars and jumped out again. Plaintiff's witness on this

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point stating that, "I saw him go in and go out as if they were going too fast." He immediately went in the second time, at a point stated to be from thirty to fifty feet north of the north end of the guardrail, and was killed; his body being found lying across one of the main rails about ten feet south of the south end of the guardrail; the latter rail being ten or fifteen feet in length.

Our conclusion is that notwithstanding there was evidence tending to show that deceased's foot was caught in the unblocked place between the guardrails and main rail, yet the uncontradicted evidence shows such character of negligence on deceased's part as to preclude plaintiff's recovery. His own and the train's movements were under his control. At most the mere movement of the train so as to give it slack would have enabled him to uncouple the cars. After setting the cars in motion and observing their rate of speed he made one attempt to uncouple and desisted. He then again, without ordering or signaling a slowing up, attempted to uncouple when he knew that to do so involved the necessity of his going with the cars at the rate of speed stated. The testimony for plaintiff shows this rate of speed (if we adopt the mean rate stated) to be five miles per hour. Now for an employe, of his own volition, to go in between cars *moving at that rate,* the evidence showing that there was *no emergency or necessity* requiring it, in my opinion amounts to recklessness. There was no necessity or emergency to influence him. The evidence shows that the uncoupling could have been done without moving the cars. He had the authority to require the train to be slowed up or stopped entirely. But with no care for results, or else with a total indifference to consequences, he chose to make a second attempt rather than have the cars moved slower. The remarks in the case of

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Marsh v. Railroad, 56 Ga. 274, are applicable to the conduct of the deceased. The court said in that case that, "He saw that the train did not stop for him to uncouple; and he, nevertheless, rushed in and tried to uncouple when the cars were in rapid motion."

Besides this, leaving out of consideration whether deceased knew that the guardrail was unblocked, yet he must have known that at a siding or switch there must be a rail crossing the track obliquely which would, of course, make it more perilous to one moving between the cars as he was compelled to move, without being able to see or look out for obstructions.

It did not appear and perhaps could not be shown whether deceased could or could not readily and quickly pull the coupling pin. But in either event he was guilty of negligence in remaining between the cars, going at that speed, for the distance covered, if he was not hurt until he reached the guardrail. If he could not pull the pin he should, under the circumstances in which he had placed himself, have stepped from between the cars instead of remaining, in the perilous effort to move along with the cars at that speed. On the other hand, if he pulled the pin readily, he indifferently and recklessly remained between the cars without even the semblance of a cause. It was negligence bordering on recklessness for him to remain between the cars approaching the switch as he knew. *Williams v. Railroad*, 43 Iowa, 396.

There was no attempt made to justify or defend deceased's act, or to show any necessity for it; on the contrary, one of the plaintiff's witnesses, an experienced railroad man, stated (without objection being made thereto) the act to have been imprudent and dangerous and not the act of a careful man. It furthermore appeared affirmatively that the act was unnecessary. Another of plaintiff's witnesses thought deceased not

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"much of a railroad man," and, from some of the observations of the witness, that he "must have been a careless man." The case seems clear to us from plaintiff's own showing that deceased's own voluntary conduct brought about the unfortunate accident causing his death, and we must, therefore, reverse the judgment.

The question of negligence in any particular case must, of course, be governed by the facts and circumstances which pertain to the case as made. Now in this case plaintiff's most material witnesses pronounced his act uncalled for, dangerous and careless. He ordered the cars to be run back when he should only have had them "slack up," so as to loosen the coupling pin. The evidence shows that without cause or necessity he went in between the cars which were moving at that speed *by his order*, and this against the rules of the company, as was practically admitted on cross-examination by plaintiff's witness, Howard, the conductor. As before stated, there was no effort made at the trial to justify or excuse the act. There was nothing to show that such acts were customary with prudent switchmen or had ever been attempted under such circumstances.

We are cited to the cases of *Railroad v. Nickels*, 50 Fed. Rep. 718; *Robb v. Railroad*, 87 Ga. 631, and *Waldhier v. Railroad*, 87 Mo. 37. In the first case there was proof of total abandonment by the company of its rules relative to coupling cars. The accident occurred from coupling cars, and was by order of the servant's superior officer. The court said that "cars cannot be coupled when both are stationary; they cannot be coupled after the moving car strikes the stationary car, save by a renewed endeavor. At some time while one of the cars is moving," the coupling must be made. In the case at bar the act was *uncoup-*

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ling cars, an act which plaintiff's testimony shows should be done when the cars are not moving. The case from Georgia was also an accident which happened in coupling cars, and where there was "direct and positive evidence tending to support the theory of safety" in doing the act.

The *Waldhier case* was where "the plaintiff by directions of his superior" was attempting to uncouple cars "moving *slowly so as to produce a slack.*" We are not able to see where these cases can be applied to the facts and circumstances of the case at bar. Reversed.

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Davis Garrett, Plaintiff Appellant, v. Jarvis Conklin & Co., Defendants Appellant.

Kansas City Court of Appeals, January 30, 1893.

1. **Practice, Appellate:** TRIAL BY COURT: EVIDENCE AND FINDING. Where the trial is before the court without instructions, the only question for the appellate court is whether there was evidence to sustain the court in its finding.

2. **Action:** COLLECTION: AGENCY. Where an assignee of a mortgagee gave the papers to the latter with directions to have them foreclosed, knowing he would have to send them to a distant state, and his agent in such state collected and promptly remitted the money to the mortgagee, the assignee cannot maintain an action against the agent for money had and received.

3. **Limitation:** MONEY HAD AND RECEIVED. An action for money had and received is barred by the five years' limitation, and plaintiff's ignorance of his cause of action will not affect the running of the statute in the absence of concealment, etc.

4. ———: TRUSTS: MORTGAGEE AND ASSIGNEE. While the mortgagee is trustee of his assignee of the note secured by the mortgage, such trust is within the statute, as only technical and continuing trusts fall without the statute.

5. **Practice, Trial:** LAWS OF SISTER STATES. The laws of a sister state must be alleged and proved as an issue of fact, or they will not be considered by the courts.

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Appeal from the Jackson Circuit Court.—Hon. R. H. Field, Judge.

Affirmed *(in part)*; reversed *(in part)*.

Beardsley & Gregory, for appellant.

(1) So far as the second count is concerned, the trial having been by the court, a jury being waived, and no instructions asked on behalf of the plaintiff, there are no errors of law for this court to review; and the verdict must stand if there was any evidence to support it. *Schultz v. Hickman*, 27 Mo. App. 25; *Garrison v. Lyle*, 38 Mo. App. 566; *Irwin v. Woodmansee*, 104 Mo. 403. (2) What is the law of the sister state is a fact to be proved, like any other fact, by appropriate evidence. *Meyer v. McCabe*, 73 Mo. 236. It cannot be presumed that the common law is in force there. *Bain v. Arnold*, 33 Mo. App. 631. (3) The authorities, depended upon to show that the statute of limitation is not a bar on both counts of plaintiff's petition, do not bear out the contention made. The cases of *Landis v. Saxton*, 105 Mo. 491, and *Shortridge v. Harding*, 34 Mo. App. 354, clearly make the distinction between such a case and the one at bar. As a further authority, that the party having elected to sue at law for money received to his use, cannot in the same suit raise the question of fraud, having waived it, we refer to a recent decision by this court. *Lumber Co. v. Hartman*, 45 Mo. App. 656.

John L. Wheeler and *Botsford & Williams*, for respondent.

(1) It is the general and well-established law that, where a bond or note, which the mortgage is given to secure, is indorsed or assigned, the mortgagee

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becomes the trustee for the person holding it. *Laberge v. Chauvin*, 2 Mo. 180; *Anderson v. Baumgartner*, 27 Mo. 87; *Grove v. Robards*, 36 Mo. 525; *Potter v. McDowell*, 43 Mo. 98; *Foster v. Porter*, 37 Mo. 534; *Ins. Co. v. Talbott*, 113 Ind. 373; *Barrett v. Hinckley*, 124 Ill. 32; Jones on Mortgages [2 Ed.] secs. 817, 818, and cases cited; *Jackson v. Willard*, 4 Johns. Ch. (N. Y.) 40; *Ferris v. Hendrickson*, 1 Ed. Ch. (N. Y.) 132; *Peak v. Elliott*, 30 Kan. 156; *Scates v. Wilson*, 9 Leigh (Va.) 473. (2) The receipt of the money by defendants in satisfaction of the mortgages of Walch and Hymer having been had without the knowledge or consent of plaintiff, and before the maturity of the mortgage debts of which plaintiff was the legal owner, the statute of limitations would not begin to run in favor of defendants as against plaintiff, until defendants set up an adverse claim to the fund, of which plaintiff had knowledge or the means of knowledge. *Battle v. Crawford*, 68 Mo. 280; *Bent v. Priest*, 86 Mo. 488, 489; *Landis v. Saxton*, 105 Mo. 491-2; *Oliver v. Piatt*, 3 How. (U. S.) 411; Perry on Trusts, secs. 230, 861, and cases cited; *Lyle v. Kennedy*, 14 Mo. App. 437; *Richardson v. Warner*, 28 Fed. Rep. 343.

ELLISON, J.—This is an action for money had and received based on a petition with two counts. The trial below was without a jury and resulted in a finding for plaintiff on the first count and for defendant on the second count. Both parties appeal.

In 1881 a loan of $800 was made by defendants to one Walch, who was living in Kansas. The loan was secured by a note and real-estate mortgage executed to R. R. Conklin, one of defendants' stockholders and officers. In the same year and about the same time, another loan of $800 was made by defendants to one Hymer, who also lived in Kansas. This loan was like-

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wise secured by a note and real-estate mortgage executed to David Hood, of West Chester, Pennsylvania. It was claimed upon the one hand that both the loans were made for Hood, and upon the other that both were made for defendants. However this may be, the note and mortgage payable to Conklin was indorsed in blank by Conklin and sent by defendants to Hood, along with the note and mortgage taken in Hood's name. Hood returned the money on them to defendants. Hood sold and delivered both these notes and mortgages to this plaintiff, who received the interest due upon them through Hood, up to 1883, when a default was made in the interest. Plaintiff then delivered over to Hood the Hymer note and mortgage, sued upon in the second count, with instructions to foreclose the mortgage. Hood sent the papers out to these defendants at Kansas City, requesting that the foreclosure be made, and also requesting the foreclosure of the Walch mortgage, notwithstanding it was in plaintiff's possession. Defendants employed an attorney in Kansas and ordered the foreclosure of both mortgages, which was done, and the money in satisfaction of the mortgages was sent to defendants in December, 1883, Conklin releasing one of them and Hood the other. Upon receipt of this money defendants forwarded it to Hood at West Chester. Plaintiff did not learn of the part defendants took in these proceedings until some time in 1888, and it seems did not know that any steps were being taken by anyone on the Walch note and mortgage which he retained. On ascertaining that defendants had collected the money on the notes, he began this suit for money had and received.

The count upon which the finding was against plaintiff was for the Hymer note, taken in the name of Hood and sent to Hood, and which was afterwards

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turned over to Hood by plaintiff to be foreclosed. The trial was before the court without a jury, and no declarations of law were asked, which leaves for us only the question, on this count, whether there was evidence to sustain the court in its finding. Our answer is in the affirmative. There is sufficient in plaintiff's own testimony to justify the court in finding against him. He delivered the note and mortgage to Hood for collection by legal proceedings. It will be assumed that he knew this would have to take place in Kansas, and that it would be necessary for Hood to send them out there to some one to look after. Hood sent them to these defendants, who immediately did as requested, and, upon realizing the money, forwarded it to Hood, from whom they received it. We fail to see any valid reason for disturbing the court's finding on this count.

On the first count the finding, as before stated, was for the plaintiff, and as, in the view of the law with which we are impressed concerning the statute of limitations, the case will turn on that plea set up by defendants we will not notice other points made and discussed by the respective counsel.

It must be borne in mind that, whatever remedy or remedies plaintiff may have been privileged to resort to against these defendants on the facts, he has chosen to bring his action for money had and received by defendants and not paid over. No wilful wrong is charged; nor is any fraud or concealment alleged. The case, therefore, does not fall within the exception of either of sections 6775 or 6789 of the limitation act. And such an action is undoubtedly barred by our statutory period of five years' limitation. But plaintiff, by an amendment to his petition, made at the close of the evidence, alleges that defendants collected the money due on the note and mortgage without authority

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from plaintiff, and that he did not discover that the defendants had collected it until May 23, 1888, a period within the five-year limit. To this we answer that the fact of plaintiff's ignorance of his right or cause of action will not affect the running of the statute, in the absence of some improper act of concealment on the part of defendants, causing or inducing such ignorance. *Smith v. Newby*, 13 Mo. 159; *Wells v. Halpin*, 59 Mo. 92; *Rogers v. Brown*, 61 Mo. 187; *Moore v. Mining Co.*, 80 Mo. 86. The statute itself has made the exceptions to the running of the limitation which the law-making power deemed expedient. The ignorance of one's rights, or of a party to proceed against, is not among these exceptions, and it is not our province to supply it. *McIvor v. Ragan*, 2 Wheat. 29. We consider the case as it is made by the petition; that being, as before stated, for money had and received. If the case had been brought in conversion, and the fraud (though it should be constructive), in converting the money had been the cause of action, it would have presented a question discussed in some of the books and referred to in *Miles v. Berry*, 1 Hill (S. C. Law) 296.

Plaintiff, however, seeks to bring these defendants under the rule governing trusts, asserting them to be trustees, in whose favor the statute would not run. He does this by showing that a mortgagee who sells the note secured holds the mortgage as a trustee for the holder of the note, and, if he receives the money due on the mortgage and note, he holds it as a trustee. We may grant this. But such a trust is palpably not of the class to which the statute has application. The trusts to which the statute does not apply are those technical and *continuing* trusts which are never cognizable at law, but belong to the equity courts exclusively. *Kane v. Bloodgood*, 7 John. Ch. 90; *Keeton v. Keeton*,

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20 Mo. 530; *Smith v. Ricords*, 52 Mo. 581; s. c., 56 Mo. 553; *Shortridge v. Harding*, 44 Mo. App. 354; *Landis v. Saxton*, 105 Mo. 486. Other trusts fall within the statute; and these embrace the mortgagee holding the mortgage, and to whom the money thereon is paid, for the benefit of the assignee of the note secured thereby.

In considering this case we have left out of view altogether the laws of Kansas, since there was no proof or evidence in the record of what those laws were. The law of a sister state may be alleged and become an issue of fact; but there must be, of course, evidence to sustain the issue.

From the whole case we shall affirm the judgment rendered in favor of defendant on the second count, and reverse the judgment against defendant on the first count. All concur.

T. P. KEEN *et al.*, Respondents, v. O. L. MUNGER, Appellant.

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St. Louis Court of Appeals, January 31, 1893.

1. **Practice, Appellate:** AMENDMENT OF PETITION: FAILURE OF DEFENDANT TO EXCEPT. The propriety of an amendment of the petition in the trial court by the addition of a party as plaintiff will not be considered on appeal, if no exception to the amendment is saved.

2. **Replevin:** SUFFICIENCY OF PETITION: AIDER BY VERDICT. The petition in this cause, which was an action of replevin, alleged that the plaintiffs owned and were entitled to the possession of the property in controversy, a mill, and that the defendant as sheriff of his county had wrongfully seized the mill under a writ of attachment against a stranger, and closed the operation of it. *Held*, after verdict for the plaintiff, that this was a sufficient allegation of a wrongful taking and detention of the property by the defendant.

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3. ———: ABSENCE OF AFFIDAVIT TO AMENDED PETITION. An action of replevin can be maintained in this state without the statutory affidavit, and, therefore, a judgment should not be arrested therein, owing to the absence of such an affidavit; and especially is this so when, as in this cause, such arrest of judgment is sought because of the absence of such affidavit to an amended petition, and when the original petition is accompanied by such affidavit.

Appeal from the Shannon Circuit Court.—HON. W. N. EVANS, Judge.

AFFIRMED.

Orchard & Clarke and *John C. Brown*, for appellant.

(1) The amended petition is fatally defective and does not state facts sufficient to constitute a cause of action. It omits to state that the property in controversy was wrongfully detained by the defendant at the time the suit was instituted, or that defendant was in possession at all. The only allegation as to possession is that he levied upon and seized an undivided one-half interest of, in and to said mill. *Furnishing Co. v. Wallace*, 21 Mo. App. 128; *Mfg. Co. v. Senn*, 7 Mo. App. 584; *Reigert v. Voelker*, 6 Mo. App. 53; Cobbey on Replevin, sec. 568. (2) The affidavit to the original petition filed by Keen cannot cure the fatal defects of the amended petition filed by Keen and Bowles. That affidavit only claims the right of possession to an undivided one-half interest, and replevin will not lie for an undivided interest in a chattel. The amended petition must be complete within itself. Revised Statutes, 1889, sec. 2107; *Ward v. Davidson*, 89 Mo. 445; *Spooner v. Ross*, 24 Mo. App. 599.

L. O. Nieder, for respondents.

ROMBAUER, P. J.—The action is replevin for a sawmill. Upon its trial in the circuit court, the plain-

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tiffs recovered judgment for possession and damages for detention. On motion for new trial the court compelled a *remittitur* of the damages, leaving the judgment one for possession only. The defendant, appealing, assigns for error that this judgment is unwarranted by the record, because the plaintiffs' petition fails to state a cause of action.

The original petition was filed by Keen alone, and sought to recover one undivided one-half interest in the sawmill. It was accompanied by an affidavit to the effect that the property was unlawfully taken, and was then being wrongfully detained by the defendant at the county of Carter. Subsequently the plaintiff Keen, discovering that it was necessary to do so, amended his petition so as to make his co-owner Bowles a party plaintiff. Whether this course was warranted, under the peculiar facts of this case, by section 2099 of the Revised Statutes, and the liberal interpretation put upon that section in *Butler v. Lawson*, 72 Mo. 227, 246, is not before us, as the amendment was not excepted to. The amended petition stated that the plaintiffs were the owners and entitled to the possession of the property in controversy, and that the defendant, as sheriff of Carter county, had wrongfully seized under a writ of attachment against a stranger one undivided half interest therein, and at the date of the seizure closed down said property, and closed the operation of the mill entirely. The amended petition did not state in express terms that the property was wrongfully taken or detained by the defendant sheriff, nor was it accompanied by any affidavit. The defendant's answer is not in the record.

It will be seen from the foregoing statement that the error assigned is not tenable. The rule in this state is, that the omission from the petition of averments essential to plaintiff's recovery is not aided by verdict,

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unless the petition contains terms sufficiently general to comprehend them by fair and reasonable intendment. *Staley House Furnishing Co. v. Wallace*, 21 Mo. App. 128, 130, and cases cited. But a petition may be aided by answer, and since the answer is not in the record we could not reverse the judgment for insufficiency in the petition, even if the objection were otherwise tenable. Whatever claim the defendant had to the property was by virtue of its seizure by him as sheriff under a writ of attachment. His answer was bound to justify the seizure, and we are bound in support of the judgment to presume that it did so justify the seizure and detention, and thus helped out the omissions, if any, in plaintiffs' petition.

But we think the objection is otherwise untenable for various reasons. The amended petition expressly states that the property was wrongfully seized, and at the date of the seizure closed down. In absence of all averments, or evidence to the contrary, it is to be presumed that it was seized in the only manner in which tangible personal property can be legally seized on attachment, that is, by taking it into the possession of the officer. *Eads, Adm'r, v. Stephens*, 63 Mo. 90, 91. A wrongful taking, therefore, is sufficiently alleged by *reasonable intendment.* The same may be measurably said of a wrongful detention, since a state of matters once shown is presumed to continue unless the contrary appears, and since it is the officer's duty to retain the property seized. Of course we concede that a presumption of evidence is not necessarily a presumption of pleading. The jury could not have found their verdict, unless a wrongful detention was shown, and, hence, the rule of aider by verdict applies. *Jones v. Louderman*, 39 Mo. 287, 290.

The objection that the judgment should have been arrested, because there was no affidavit to the amended

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petition, is untenable because the action of replevin in this state can be maintained without affidavit. *Eads, Adm'r, v. Stephens, supra; Bingham v. Morrow*, 29 Mo. App. 448. Besides that, under section 7479 of the Revised Statutes, the affidavit may be an independent instrument, and need not necessarily be annexed to the petition or filed contemporaneously therewith. A wrongful detention was expressly averred in the affidavit originally filed.

We conclude that under these circumstances we would not be justified in reversing the judgment on the sole ground that the petition states no cause of action, when the record by its silence on other points concedes that the case has been tried free from error.

All the judges concurring, the judgment is affirmed.

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H. BROTHERTON *et al.*, Appellants, v. TENNESSEE SPENCE, Respondent.

St. Louis Court of Appeals, January 31, 1893.

Administration: PROCEEDINGS TO DISCOVER ASSETS. When a person is charged with wrongfully witholding the goods or chattels of a decedent, and is cited to appear before the probate court pursuant to section 74, of the Revised Statutes, all proceedings after his preliminary examination must take place at the instance of the executor or administrator of the estate. Accordingly, when the administrator declines to file interrogatories under section 75 of the Revised Statutes, the distributees of the estate cannot do so.

Appeal from the Howell Circuit Court.—HON. W. N. EVANS, Judge.

AFFIRMED.

Monks, Wheeler & Woodfin, for appellants.

Jones, Olden & Orr, for respondent.

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Rombauer, P. J.—A preliminary question is raised by the defendant touching our jurisdiction. It is claimed by her that the appeal herein from the probate to the circuit court was not taken by the plaintiff, either within the term when the decision complained of was made, or within ten days thereafter, as required by section 286 of the Revised Statutes. The judgment entry made in the probate court bears no date, but it sufficiently appears from the entire transcript that the decision complained of was made at the adjourned December term of the probate court of Howell county, and that an appeal to the circuit court was taken by the defendant during that term. The question of jurisdiction must, therefore, be determined in favor of appellants.

The proceeding is one for the discovery of assets under the provisions of section 74, and following, of the Revised Statutes, and involves the construction to be placed upon section 75 as applicable to the facts shown by this record. These sections are as follows:

"Sec. 74. *Proceedings to discover assets—affidavit—citation.* If the executor or administrator, or other person interested in any estate, file an affidavit in the proper court, stating that the affiant has good cause to believe and does believe that any person has concealed or embezzled, or is otherwise wrongfully withholding any goods, chattels, money, books, papers or evidences of debt of the deceased, and has them in his possession or under his control, the court may cite such person to appear before it, and compel such appearance by attachment.

"Sec. 75. *Interrogatories to parties cited—proceedings.* If the party so cited does not admit the allegations in the affidavit, he shall be examined under oath, after which, at the instance of the administrator or

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executor, other witnesses may be examined both for and against such party; but before such other witnesses shall be examined interrogatories shall be filed in writing, to be answered also in writing by the parties cited."

Subsequent sections provide for a trial upon these interrogatories and answers in a summary manner.

In the case at bar the plaintiffs, who are distributees of the decedent's estate, filed an affidavit in the probate court charging that the defendant, widow of the deceased, converted to her own use three hundred bushels of wheat, twelve hundred bushels of corn, fifty bushels of potatoes, seventy-five bushels of rye, and one horse, belonging to the estate of the deceased, and that she had the same in her possession. The defendant was thereupon cited to appear, and did appear before the probate court and was examined. The administrator declined to file interrogatories, whereupon the probate court discharged the defendant, and the plaintiffs appealed. In the circuit court the defendant appeared and testified that there was a large amount of wheat, corn and potatoes grown on the farm in the year of her husband's decease, also a crop of wheat and rye sown and growing at that time. She also testified that she took all of said property, as well as five little shoats that were not inventoried. It did not appear whether any of this property was in her possession when the affidavit was filed. The plaintiffs thereupon asked leave to file interrogatories to be answered by the defendant, and asked leave to introduce evidence showing the amount and value of the personal property thus converted by the defendant to her own use. The court denied plaintiffs' right so to do, on the ground that the administrator refused to file interrogatories as required by law, and, thereupon, dis-

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missed the plaintiffs' petition. This action of the court is the error complained of.

It will be thus seen that the entire controversy turns on the proposition whether under section 75, *supra,* after a preliminary examination of the person cited is had, all further proceedings must take place at the instance of the administrator or executor, or whether the affiants may proceed with the further conduct of the inquiry and trial, whether the administrator is willing to do so or not. We conclude that the first of these propositions is the correct one. The law, as it stood prior to the amendment of 1879, did not contain the words "at the instance of the administrator or executor," although we think even then those words were implied, because it would be anomalous to carry on a controversy, touching the personal assets of the estate in the probate court, in a proceeding wherein the administrator was neither a party plaintiff nor defendant. The much litigated case of *Eans v. Eans,* 79 Mo. 53, reported under the title of *Gordon v. Eans,* on its second appeal in 97 Mo. 587, throws no light on this inquiry, because there the administrator was a party. Nor does the case of *Shaw, Adm'r, v. Groomer,* 60 Mo. 495, where the affidavit was filed by a person who had no interest in the estate, and where the probate court never acquired any jurisdiction, and, hence, the circuit court could acquire none on appeal from the probate court. Besides this proceeding can only be maintained where the identical assets are still in the hands of the party cited. *Dameron, Adm'r, v. Dameron,* 19 Mo. 317; *Howell's Ex'r v. Howell,* 37 Mo. 124. The administrator may have refused to proceed, because the identical assets were no longer in possession of defendant.

It is the duty of an administrator to inventory all

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of the assets of the estate, and to file additional inventories when he discovers additional assets. For his failure to do so, he is liable upon his bond. The remedy of the affiants in this case is ample, all the more so since they specially called the attention of the administrator to the existence of these assets, which he failed to inventory. They have given him an opportunity to try the question as to whether the property mentioned is assets of the estate, and he has declined to avail himself of it. He has done so at his peril. But the court could not confer on the affiants the right to try the question in this proceeding on their own behalf, when the administrator declined to do so on his own.

The judgment is affirmed. All the judges concur.

THE STATE OF MISSOURI, Plaintiff in Error, v. MARK RAMSEY, Defendant in error.

St. Louis Court of Appeals, January 31, 1893.

52 668 / 55 334 1. **Criminal Law:** INFORMATION FOR DISTURBANCE OF THE PEACE. An information for the disturbance of the peace of the neighborhood by the defendant is sufficient, if it follows the language of the statute.

2. ———: ———: VERIFICATION. An information filed by the prosecuting attorney is filed on his official oath, and need not be verified.

Error to the Phelps Circuit Court.—HON. C. C. BLAND, Judge.

REVERSED AND REMANDED.

No briefs filed for either the plaintiff or the defendant in error.

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ROMBAUER, P. J.—The state prosecutes this writ from a judgment quashing an information against the defendant. The writ was sued out of the supreme court, but, on suggestion of the attorney general, the cause was transferred to this court as being one within its exclusive jurisdiction.

The information was filed in the circuit court by the prosecuting attorney, and was verified by the affidavit of a witness made upon his best knowledge, information and belief. Omitting formal parts it states that the defendant, on a day therein named, with force and arms, unlawfully and wilfully did disturb the peace of the neighborhood of Camp Creek in said county by then and there making loud and unusual noise, loud and offensive and indecent conversation, and by threatening, challenging, quarreling and fighting, contrary to the statute, etc.

The motion to quash challenged the sufficiency of the information on the grounds that several offenses were charged in one count, and so indefinitely that the defendant is not advised of what offense he is charged; also because the indictment failed to set out the indecent and offensive conversation, and what the noise consisted in; also because the information was not properly verified. No briefs have been filed in this court on either side.

The case was tried in August, 1890, and we assume that the court in quashing the information was guided by our views as expressed in *State v. Bach*, 25 Mo. App. 554, under which the information would have clearly been liable to the objection first above mentioned. Upon reconsideration of the question in *State v. Fare*, 39 Mo. App. 110, the case of *State v. Bach* was overruled, and we held that the offense against which the statute was leveled was the disturbance of the peace of a neighborhood, etc.; that the

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words of the statute were sufficiently descriptive of the offense, and that an information following the language of the statute was sufficient. The *Fare case* disposes of the first two objections to the information. See also *State v. Parker*, 39 Mo. App. 116.

The supreme court has decided that an information filed by the prosecuting attorney is filed on his official oath, and need not be verified. *State v. Ransberger*, 106 Mo. 135, 145.

It results from the foregoing that the information is sufficient, and that the court erred in quashing it. All the judges concurring, the judgment is reversed and the cause remanded.

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BY BEN ELI GUTHRIE.

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1. Action by wife for death of husband—estoppel—reliance on representation.—Where a mother acts as next friend for her children in an action by them for the death of their father, the fact that the petition alleges that the mother has failed to sue within the period of six months, to which her right of action is limited, will not estop the mother from denying the truth of that allegation in proceedings on her part against the same defendant, if the defendant has not acted upon the allegation to his prejudice, as where there has been neither compromise of the action of the children, nor a judgment therein against the defendant. *Reichla v. Gruensfelder, 43.*

2. Contract—altering terms.—A agreed to pay B a certain amount on a certain day when certain money was to be paid B by C. B subsequently extended C's time of payment and failed to make efforts to collect of C. *Held*, B could not thus prejudice A's rights, and, on such conduct of B, A's demand became due, and would sustain an action. *Webster v. Myers, 338.*

3. Collection—agency.—Where an assignee of a mortgage gave the papers to the latter with directions to have them foreclosed, knowing he would have to send them to a distant state, and his agent in such state collected and promptly remitted the money to the mortgagee, the assignee cannot maintain an action against the agent for money had and received. *Garrett v. Conklin, 654.*

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ADMINISTRATION.

PROCEEDINGS TO DISCOVER ASSETS.—When a person is charged with wrongfully withholding the goods or chattels of a decedent, and is cited to appear before the probate court pursuant to section 74 of the Revised Statutes, all proceedings after his preliminary examination must take place at the instance of the executor or administrator of the estate. Accordingly, when the administrator declines to file interrogatories under section 75 of the Revised Statutes, the distributees of the estate cannot do so. *Brotherton v. Spence, 664.*

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ALTERATION.

1. OF INSTRUMENT—MATERIAL OR IMMATERIAL—VITIATES.—Any alteration by the holder of a promissory note after delivery and without the consent of the maker, however immaterial in its nature, will vitiate the instrument, and render the same void. *Kingston Savings Bank v. Bosserman, 269.*

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1. FILING TRANSCRIPT—DUTY OF CLERK—STATUTE—ORDER OF JUDGE. By amendment to section 2252, Revised Statutes, 1889 (Laws, 1891, 69), after an appellant directs the clerk to make out a perfect transcript, he can wait notice from the clerk that the transcript is completed, and until such notice he is not in default, nor does it affect the matter that the court in granting an extension of time to file bill of exceptions added to the order: "But this extension in nowise to extend time for filing transcript." *The State ex rel. v. Gage Bros., 464.*

2. FINAL.—It is ruled on the authority of *Moody v. Deutch*, 85 Mo. 237, that the judgment in this case would sustain an appeal. *Cherry v. Railroad, 499.*

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1. INTERPLEA—EXEMPTIONS CLAIMED BY WIFE—NON-RESIDENCE OF HUSBAND.—By section 4908, Revised Statutes, 1889, the wife of an absconding husband can claim the exemptions allowed by section 4903, or may select and hold as exempt any other property not exceeding $300 in value, although the absconding husband has not the articles exempted by the statute, and she may sue for and recover the same in her own name and can interplead therefor in an attachment suit against her husband, and can only be defeated therein by the non-residency of the husband. *Lindsey v. Dixon, 291.*

2. ABSCONDING—NON-RESIDENCY.—One may abscond or absent himself from his place of abode without becoming a non-resident. *Ib.*

3. ORDER OF SALE—PROCEEDING IN REM—VALID TITLE.—Attachment is not a proceeding *in rem*, and does not bind a stranger thereto; but the proceeding therein which results in the sale of the attached property *pendente lite* is a proceeding *in rem* which confers a valid title on the purchaser, but the sheriff cannot shelter himself behind such title. *The State ex rel. v. Hadlock, 297.*

4. DAMAGES—COUNSEL FEES—INSTRUCTION.—In an action on an attachment bond an instruction, which tells the jury that as an element of damages relator was entitled to recover such reasonable sum as the evidence showed she had paid for attorneys' fees, is proper. *The State ex rel. v. Gage Bros., 464.*

5. ——— ——— ———. In an action on an attachment bond the measure of damages is the value of the goods at the time of the seizure with interest at the rate of six per cent. to the time of the trial. *Ib.*

6. ACTION ON BOND.—Where an appeal from the judgment on the plea in abatement in an attachment suit is dismissed an action may be instituted on the attachment bond. *Ib.*

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2. DAMAGES FOR WRONGFUL ATTACHMENT—COUNSEL FEES.—In an action for damages for a wrongful attachment, only such counsel fees can be recovered as were incurred in obtaining the dissolution of the attachment. Accordingly, it was *held* in this cause, wherein the attachment was dissolved on the hearing of the plea in abatement, that it was erroneous to admit proof of the amount of all the counsel fees in the case. *Ib.*

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3. TRUSTS AND TRUSTEES.—A deed of trust in the event of the trustees therein named refusing to act authorized any attorney of record residing in the state of Missouri whom the beneficiary might appoint in writing to act. *Held*, the attorney of the beneficiary was competent to act. (*In re Mayfield*, 17 Mo. App. 684, *distinguished.*) *Cloud v. Kansas Loan & Trust Co.*, *318.*

4. EVIDENCE — PRIVILEGED COMMUNICATIONS. — Defendant and his attorney were present at a settlement with plaintiff's firm, and the attorney made certain *memoranda* of the settlement showing the application of certain notes and credits. *Held* such *memoranda* were not privileged, but were admissible in evidence on the part of plaintiff, following *Deuser v. Walkup*, 43 Mo. App. 625. *Deuser v. Hamilton*, *394.*

AUCTION. See NEGLIGENCE, 3, 4, 5.

BANKS AND BANKING.

1. CASHIER ESTOPPED—PROFITS—EVIDENCE.—Where the cashier of a bank transacts business officially for the bank, and at its instigation he is estopped from denying his agency, and the profits on such, transaction belong to the bank and not to the cashier; and in an action to recover such profits the whole transaction is admissible in evidence. *Mt. Vernon Bank v. Porter*, *244.*

2. ——— ULTRA VIRES—NEGOTIATION OF BONDS.—If it were *ultra vires* for the bank to negotiate water bonds, such transaction is not *malum in se*, can only be taken advantage of by the state, and the cashier through whom the contract was made cannot set it up to retain for himself the profits of the transaction. *Ib.*

3. CASHIER'S TIME—CORPORATE BUSINESS.—If the contract was with the bank and the business was for the bank, in order for it to recover the profits of the cashier, it would not seem necessary to show he was to devote his whole attention to the bank, and do no other business. *Ib.*

4. POWER TO NEGOTIATE BONDS—PRINCIPAL AND SURETY.—Under the statutory charter of Missouri state banks, they are authorized to handle negotiable bonds and can sell or place them for their customers, and the sureties of a cashier would be liable for his misappropriation of the profits of such transaction. *Ib.*

5. COLLECTION—CONSIDERATION—CONVERSION.—When a bank received a note for collection and wrongfully gave it over to another, whereby it was lost, the fact that plaintiff in an action for its conversion fails to allege and prove that it undertook the collection for a consideration will not defeat a recovery. *Keyes v. Bank*, *323.*

6. POWER TO COLLECT.—While corporations have only such powers as are expressly or impliedly given by their charters, yet the power to receive commercial paper for collection is necessarily implied from the character of the banking business. *Ib.*

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BILLS AND NOTES. See ALTERATION, 1, 2; CHATTEL MORTGAGES, 1; CONTRACTS, 4; FRAUDULENT CONVEYANCES, 2.

1. IMPLIED AUTHORITY TO INDORSE IN NAME OF PAYEE.—One who is authorized to collect a promissory note for the payee, but himself resides at a point far distant from the place of payment, has implied authority to indorse it in the name of the payee to a resident of the place of payment for collection. *Willison v. Smith, 133.*

2. AGREEMENT ON BACK.—An agreement on the back of a promissory note before signing is not a prior or contemporaneous agreement, but a part of the note. *Kalamazoo Nat. Bank v. Clark, 593.*

3. SIGNING ONE CONTRACT FOR ANOTHER—FRAUD—JURY QUESTION.—If one intending to bind himself by a written obligation voluntarily signs what he supposes to be the intended obligation, with full means of ascertaining its true character, of which he fails to avail himself, he cannot be heard to impeach its validity when such instrument turns up as a negotiable promissory note in the hands of a *bona fide* holder; but whether he signed in ignorance, through artifice of the payee, is a question for the jury. *Ib.*

4. INFIRMITY—NEGLIGENCE.—If a party is deceived by reason of some natural infirmity or educational defect, his want of faculties to detect fraud shields him; but if he contributes to the imposition or fails to exercise prudent diligence, he should suffer rather than an innocent holder. *Ib.*

5. ——— ———. The jury in passing upon the negligence of a maker of a note can take into consideration his age, mental power and physical infirmities. *Ib.*

6. CONTRACT ON BACK—FRAUD.—Where a maker signs a note believing, through the payee's fraud, there is an agreement on the back thereof, when there is not, he is no more bound thereby than if it were a total forgery. *Ib.*

BONDS. See PRINCIPAL AND SURETY, 3.

BOUNDARY. See STATE BOUNDARY.

BURDEN OF PROOF. See REPLEVIN, 4.

PRESUMPTIONS.—When an indebtedness is once shown to exist, it is presumed to continue unless the contrary is shown. Accordingly, when a collection of money by an agent for his principal is established, there is no presumption that he has paid or accounted for it to his principal. *Ib.*

CARRIERS.

PASSENGER CARRIERS—TICKET WITH STOP-OVER PRIVILEGES—ACTION. A first-class passenger ticket read, "good to stop off at all points." *Held*, this justified the passenger in stopping off at a station short of his destination, and subsequently within the life of his ticket taking

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another train to his destination, and though, on his presentation to the conductor of his ticket, with notice of his intention to stop over, the conductor took it up and gave no check or token in lieu thereof, the passenger's rights will not be prejudiced, and the same conductor with knowledge of all the facts will not be justified in ejecting him from the train on his subsequent resumption of his journey; nor is it incumbent on the passenger in such case to pay the additional fare and sue for its recovery, but he may sue for damages for the wrongful expulsion. *Cherry v. Railroad*, *499*.

CHATTEL MORTGAGES.

1. REPLEVIN BY HOLDER OF NOTE FOR COLLECTION.—After condition broken, the mortgagee may maintain an action of replevin for the property covered by a chattel mortgage, and this right passes to the indorsee of the note secured by the mortgage, though he holds it only for collection. *Willison v. Smith*, *133*.

2. OWNER—POSSESSION—SUBSEQUENT MORTGAGE.—Where one is in possession of personal property and exercising acts of ownership over it by mortgaging it, it may, nothing else appearing, be legitimately inferred that he is the owner, though such mortgagee's title would not prevail over that of a subsequent mortgagee from the real owner. *Banking House v. Brooks*, *364*.

3. STATUTE.—Where there was an absolute sale, and the vendor of chattels receives part of the purchase price and takes a chattel mortgage to secure the unpaid balance, sections 5180 and 5181, Revised Statutes, 1889, have no application to the transaction, and upon default the mortgagee can replevin the goods without tendering back the sum paid on the purchase price. *Wurmser v. Sivey*, *425*.

4. STOCK IN TRADE—KEEPING PROCEEDS.—If it is agreed between the mortgagor and the mortgagee that the former should sell the mortgaged merchandise in the usual course of trade, and keep all the proceeds of such sales for his own use, except enough to pay the mortgagee's debt, the mortgage is fraudulent and void as to creditors. *Helm v. Helm*, *615*.

CLERK. See APPEALS, 1.

COLLATERAL SECURITY. See PRINCIPAL AND SURETY, 5.

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CONSTITUTIONAL LAW.

NEW TRIALS—ACT OF 1891.—The act of 1891 (Session Acts, p. 70), allowing an appeal from the action of the trial court in granting a new trial, takes away no vested right nor impairs the obligation of any contract, and is, therefore, not unconstitutional; and can be applied to a case pending at the time of its passage. *Lovell v. Davis, 342.*

CONSTRUCTION.

1. LETTERS—OFFER TO CANCEL—ACCEPTANCE—COURT'S DUTY—EVIDENCE.—Two letters set out in the opinion are construed to be an offer to cancel an existing contract, and an exceptance of that offer; and *held* it was the court's duty to construe them, and any explanation of a private intention cannot control their evident meaning. *Hunt & Booth v. Hunter, 263.*

2. ORDINANCE—WATER WORKS MONOPOLY.—An ordinance, giving the defendant corporation exclusive right to operate a system of water works in the city, fixed the maximum rate at twenty-five cents per thousand gallons, approximated at so much per annum for dwellings, etc., provided the party requiring a meter should pay the expense of the same. Plaintiff piped his dwelling, put in the most approved meter, tendered the necessary charges to the company. *Held*, it was the company's duty to turn on the water. *The State ex rel. v. Joplin Water Works, 312.*

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1. IMPLIED AGREEMENT OR UNDERSTANDING TO COMPOUND A FELONY. A contract to pay money upon an agreement or understanding for the compounding of a felony is invalid, whether such agreement or understanding is express or implied. *Janis v. Roentgen, 114.*

2. ALTERING TERMS.—A agreed to pay B a certain amount on a certain day when certain money was to be paid B by C. B subsequently extended C's time of payment, and failed to make efforts to collect of C. *Held*, B could not thus prejudice A's rights, and, on such conduct of B, A's demand became due, and would sustain an action. *Webster v. Myers, 338.*

3. CONFLICT OF LAWS—VALIDITY.—The validity of a contract, whether as to the form or manner of its execution, or as to the capacity of parties, should be determined by the law of the state where the same is entered into, and, if valid there, it is valid everywhere; and this rule alike governs the disabilities of coverture, infancy, etc. *Phœnix Life Ins. Co. v. Simons, 357.*

4. ——— WHERE MADE—DELIVERY—MARRIED WOMAN.—A note made by a married woman, dated in Kansas, executed in Missouri, was sent to and delivered in Kansas. *Held*, a Kansas contract, as it was the delivery that completed the contract and gave it life; and it, therefore, bound the maker according to the laws of Kansas, which would be enforced in the Missouri courts. *Ib.*

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5. BREACH—MONEY HAD AND RECEIVED.—Defendant sold plaintiff a half interest in his saloon for $500, $200 down, which was paid, $200 to be paid the next day, and the other $100 in thirty days. The second $200 was never paid. On the eighth day defendant told plaintiff he would run the saloon himself, whereupon the plaintiff demanded the $200 paid which was refused, and he sued for money had and received. *Held*, he had committed a breach of his contract; that his sickness and attendance in court as shown in the evidence furnished no excuse for the breach, and he was in no condition to defeat the contract by rescission. *Felix v. Bevington, 403.*

CONTRIBUTION.

PRINCIPAL AND AGENT.—Plaintiff and defendant were co-sureties on two promissory notes, on one of which judgment was obtained against both, and on the other against plaintiff only. Executions were levied on plaintiff's land, which plaintiff then conveyed to defendant in consideration of his satisfying the executions, which he did. *Held*, plaintiff's land paid the judgments, and defendant must contribute his half of the debt to plaintiff. *Held, further*, the deed and agreement was not a final settlement between the co-sureties, nor a new contract superseding their prior relations and constituting a bar to the contribution. *Frost v. Tracy, 308.*

CONVERSION. See BANKS AND BANKING, 5; EVIDENCE, 17.

1. ACT INCONSISTENT WITH OWNER'S RIGHT.—An act inconsistent with the owner's right, as a refusal to give up a mare, except at the end of a replevin suit, is sufficient to make out a case of conversion. *Banking House v. Brooks, 364.*

2. PROPERTY ON RAILROAD RIGHT OF WAY—POSSESSION.—Defendant's possession of the ties at the time of conversion would in this case defeat plaintiff's action, but being on a railroad right of way, though for future shipment, did not put defendant in possession so as to defeat the action. *Baker v. Railroad, 602.*

3. MEASURE OF DAMAGES.—The rule of damages is the value of the property at the time of the conversion, with six per cent. interest to the time of trial; but a less specific rule will not reverse where the jury are not misled. *Ib.*

4. PRINCIPAL AND AGENT.—Defendant sent out its agents with its tie train to take up the ties it had purchased from one North, and in doing so they, against the consent of the plaintiff, took up and carried his ties away, and have not returned them. This constituted an unlawful conversion and rendered defendant liable. *Ib.*

CORPORATIONS. See MANDAMUS, 1.

1. VALIDITY OF INCORPORATION.—At common law no registry of the charter of a corporation is requisite. *Roll v. Smelting & Mining Co., 60*

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2. ——— ESTOPPEL.—A corporation was formed under the laws of a foreign state, under which the registry of the certificate of incorporation was essential. It entered into a contract as a corporation prior to such registry, but completed its organization by such registry prior to the institution of a suit upon the contract. *Held* in the course of discussion that it was estopped in that suit from denying the validity of its incorporation. *Ib.*

3. ——— ENFORCEMENT OF CONTRACT FOR ISSUE OF CORPORATE SHARES FOR LESS THAN FULL VALUE.—When a corporation contracts to issue corporate shares for a consideration, the fact, that this consideration does not amount to the full value of the shares, is of no consequence in an action by the shareholder against the corporation for the enforcement of the contract. *Ib.*

4. SHAREHOLDERS.—A certificate of stock is only one of the evidences of the title of the shareholder, and the issue of one is not necessary for the purpose of charging him with the liability of a shareholder in favor of a creditor. *Kimball v. Davis*, 194.

5. CONSTRUCTION OF FOREIGN STATUTE—EFFECT OF INTERPRETATION GIVEN IN FOREIGN JURISDICTION.—In the construction of a foreign statute the interpretation placed upon the statute by the highest court of the foreign jurisdiction is conclusive. *Ib.*

6. ——— ———. A statute of Iowa provided that the failure to comply substantially with another statutory requirement for the publication of a certain notice should render the individual property of the stockholders liable for corporate debts. *Held*, that the word stockholders, as used in this statute, included corporators or members having a direct financial interest in the business of the corporation with a power to participate in the profits and in the conduct of its affairs. *Ib.*

7. ——— ———. *Held* also that, under this statute, the publication of such notice was a condition precedent, not necessarily to the existence of the corporation as an artificial body, but to clothing its members with the immunity of corporators from liability for corporate debts. *Ib.*

8. FOREIGN CORPORATORS—LIABILITY OF SHAREHOLDERS—ENFORCEMENT OF FOREIGN STATUTE.—Penal statutes are local, and are not enforced on any principle of comity outside of the jurisdiction enacting them. But *held*, that the aforesaid statute of Iowa was not penal, since it did not take away anything already granted, but merely prescribed a condition precedent to the acquirement by shareholders of immunity from liability for corporate debts. *Ib.*

9. ——— ——— ———. *Held*, in the course of discussion, and without regard to the question of the validity of an incorporation obtained by citizens of one state under the laws of another, with the intention of carrying on business in their own state, that such incorporators cannot, under the guise of being exempt from foreign penal

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statutes, import into their own state by means of such incorporation any greater immunities or franchises than they possess in the state of their incorporation. *Ib.*

10. ——— FOREIGN STATUTORY PROVISIONS FOR PUBLICATION OF NOTICE —SUFFICIENCY OF NOTICE.—*Held* that a certain notice published in pursuance of the aforesaid statute of Iowa did not comply with the requirements of the statutes of that state, in that it did not state truly either the amount of the capital stock authorized, or the times and conditions on which it was to be paid in; also that a second notice was defective in the latter respect. *Ib.*

11. ELECTION OF DIRECTORS—RIGHT TO CUMULATIVE VOTING—SILENCE. The right of the shareholders of a corporation to vote in the election of directors on the cumulative plan is one guaranteed by law, constitutional and statutory, is personal to them, to be exercised as each may for himself elect, and cannot be taken away by resolution or by-law adopted by a majority of the shareholders, and such right will not be affected by mere silent acquiescence in the act of others. *Tomlin v. Bank*, *430.*

12. ——— SETTING ASIDE ELECTION OR INSTALLING ELECTED DIRECTORS.—In a proceeding under sections 2520 and 2521, Revised Statutes, 1889, to inquire into the election of the directors of a corporation, where the report of the inspectors shows they have followed the law and certified and returned all the votes as cast, and the wrong is in the organization of the directory in recognizing as a director A, not elected, instead of B, who was elected, it is error to set aside the election, but the court should oust A and seat B, unless something transpired which prevented votes from being tendered in accord with the free will of the voting stockholders. *Ib.*

13. ——— ———. *Arguendo* the following rules are discussed: When legal votes tendered by the complaining party are rejected, he thereby falling short of a majority cast, he cannot be installed, and a new election should be ordered. In New Jersey if the received and rejected votes make a majority for the complaining party, he should be seated without a new election. *Ib.*

14. ——— AGREEMENT TO VOTE FOR CERTAIN PARTIES.—Whether an agreement of certain stockholders, expressed to be for the benefit of the corporation, not to sell stock or grant proxies, or vote for anyone outside of their number, is against public policy, is not decided, since, if void, it is harmless and free from immorality, and it is a dangerous precedent to permit an inquiry into the motive of the shareholder in choosing a directory. *Ib.*

15. RECEIVERS—ACTION—PLEADING.—A railroad corporation had collected only five per cent. of its capital stock, which it had expended. Judgments had been rendered against it, which, in default of assets, had been, on proper legal proceedings, paid by the plaintiffs as stockholders therein, and other debts and judgments

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existed; the officers and directors of the corporation had not met for eighteen months, and had made no provision for its debts; its franchises were abandoned, and it had no assets. Some of its shareholders are non-residents and some are insolvent, and plaintiffs are about to have cast upon them the payment of the entire corporate indebtedness. *Held*, plaintiffs can maintain a bill for the appointment of a receiver, to assess the stockholders to pay debts, etc., and plaintiff's petition, summarized in the opinion, states a good cause of action. *(Following Thompson v. Greeley*, 107 Mo. 577.) *Ford v. Railroad, 439.*

16. ——— ——— POWERS OF COURTS.—No interference with the management of a corporation can be justified, and courts have no jurisdiction to appoint receivers in the absence of statutory authority, except in cases of extreme necessity. *Ib.*

17. UNCOLLECTED STOCK—CORPORATE DEBTS.—Unpaid stock is a trust fund for all the debts of the corporation, and a court of equity will provide a remedy to compel delinquent shareholders to contribute their ratable proportion to the discharge of corporate debts. *Ib.*

18. FORFEITURE OF CHARTER—RAILWAY EXPENDING MONEY—STATUTES CONSTRUED—TRUSTEES.—Under section 2664, Revised Statutes, 1889, if a railway corporation does not begin the construction of its road within two years, and within one year thereafter expend thereon not less than ten per cent. of the capital stock, such failure *ipso facto* extinguishes its corporate powers and existence, and it accomplishes not only a dissolution of the corporation, but divests the president and directors of their powers as such, and invests them with the specific powers enumerated in section 2513, Revised Statutes, 1889; and this is adhered to on rehearing, and the cases of *Bank v. Garton*, 34 Mo. 123, and *Bank v. Bredow*, 31 Mo. 538, are distinguished, and the banking law of 1855-6-7 is construed. *Ib.*

19. DISSOLUTION—SERVICE OF PROCESS—TRUSTEES.—Where a railway corporation is dissolved by the force of section 2664, Revised Statutes, 1889, service of process upon its president or managing officer can confer no jurisdiction over the person of the dead corporation, as such officers can neither appear nor defend for such corporation. *Ib.*

COSTS.

1. PRACTICE, APPELLATE.—In a suit in equity the question of the costs of an appeal is to some extent within the discretion of the court. In this cause, wherein the respondent was successful on the main issue, they were taxed against the appellant and respondent in equal shares. *Roll v. Smelting & Mining Co., 60.*

2. ——— COSTS FOR PRINTING ABSTRACTS.—Appellant filed in the appellate court a complete transcript of the record, and also filed an abstract of such record. His appeal being sustained he filed a

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motion to tax costs of printing his abstract against the respondent. *Held*, respondent is not liable for such costs, as he is taxable with the costs of the transcript. *Gage Bros. v. Rogers Sisters, 331.*

COURTS.

1. JURISDICTION.—The circuit courts of Illinois are courts of general jurisdiction, and the law there is that nothing shall be intended to be out of the jurisdiction of a superior court, but that which especially appears to be so, and nothing shall be within the jurisdiction of an inferior court but that which is expressly alleged. *Kincaid v. Storz, 564.*

2. ——— PRACTICE—PLEAS IN BAR AND IN ABATEMENT.—Whatever matter of defense shows that plaintiff can have no cause of action must be pleaded in bar; but that which merely defeats the present suit, and does not conclude the plaintiff from maintaining an action upon the cause stated, should be pleaded in abatement. So in a suit brought in the circuit court of an Illinois county, where the defendant does not reside, with process served in the county of his residence, the defendant waives his right to object to the jurisdiction of the court, unless he pleads his non-residency in abatement, and the judgment rendered against him will be valid and binding. *Ib.*

CRIMINAL LAW.

1. SALE OF INTOXICATING LIQUOR BY DRUGGISTS.—When a druggist sells intoxicating liquor, upon the written prescription of a practicing physician, and pleads that fact in defense of a criminal prosecution for such sale, the good faith of the physician who issued the prescription is not material. (THOMPSON, J., *dissents.*) *The State v. Bevans, 130.*

2. ——— LOCAL-OPTION LAW.—The adoption of the local-option law does not displace the law permitting the sale of intoxicating liquor by a druggist upon the written prescription of a practicing physician, and the latter law may, therefore, be invoked by a druggist as a defense to a criminal prosecution under the local-option law. *Ib.*

3. SUFFICIENCY OF EVIDENCE—ASSAULT.—The evidence in this case is *held* sufficient to justify a jury in the inference that defendant placed his hand on the prosecutrix or retained his hold upon her against her will for a lustful and immoral purpose, which amounts to an assault. *The State v. White, 285.*

4. ASSAULT—VIOLENCE—LUST.—To touch a virtuous wife in the way of illicit love is a far greater outrage than to touch her in anger, and equally a breach of the peace; one is the assault of violence, the other of lust. *Ib.*

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5. DIFFERENCE IN ASSAULTS.—There is a wide difference between an assault with intent to commit a rape and an assault with intent merely to have an improper sexual connection. *Ib.*

6. ASSAULT—INSTRUCTION—EVIDENCE.—As there was not sufficient evidence to support a verdict for assault with intent, etc., it was error to submit that issue to the jury by instruction. *Ib.*

7. ——— SOLICITATION.—The mere verbal solicitation of a woman does not constitute an assault. *Ib.*

8. INDICTMENT—RULE—STATUTORY OFFENSE.—An exception contained in the section of the statute defining an offense and constituting part of its description must be negatived in the indictment. *The State v. Sparrow, 374.*

9. INDICTMENT—HUNTING—EXCEPTION.—An indictment under section 3900, Revised Statutes, 1889, for unlawful hunting within the inclosure of John Quinn without the consent of John Quinn, the owner, is bad, as it does not charge that it was also without the consent of the person in charge. *Ib.*

10. ILLEGAL HUNTING—FENCE.—An inclosure is sufficient for the purpose and objects of section 3900, *supra*, if the fields of several are under a common inclosure, without a partition fence of any kind, lawful or unlawful. *Ib.*

11. ——— ———. An inclosure is sufficient under said section if it makes it apparent that the owner is holding the land to the exclusion of the public and for his own exclusive use, though the fence have a gap down near the public road. *Ib.*

12. ———. MISDEMEANOR—INDICTMENT.—Hunting within the inclosure of another without lawful consent is a misdemeanor, and may be prosecuted by indictment or information. *Ib.*

13. INFORMATION—DRUGGIST SELLING LIQUOR.—An information against a defendant for illegal sale of intoxicating liquor which charges him with "being then and there a dealer in drugs and medicines" is insufficient under chapter 58, Revised Statutes, 1889, which is leveled against druggist, proprietors of drug stores and pharmacists. *The State v. Baskett, 389.*

14. INFORMATION—FOLLOWING STATUTE.—An offense should be charged, substantially at least, as set out in the act defining it. An information, charging a druggist with selling intoxicating liquors in quantities less than one gallon, is bad, under chapter 58, Revised Statutes, 1889, which places the *minimum* at four gallons. *Ib.*

15. ISSUE OF PRESCRIPTION FOR INTOXICATING LIQUORS.—To justify the conviction of a physician under section 4624 of the Revised Statutes for the issuance of a prescription for intoxicating liquors to be used otherwise than for medicinal purposes, it is not requisite that the physician should have been a registered physician, nor that he should have been engaged in the practice of medicine in the county. *The State v. Anthony, 507.*

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16. INDICTMENT.—An indictment under that section need not set forth the prescription *in hæc verba;* nor need it state the kind or quantity of the liquor for which the prescription was issued. *Ib.*

17. INFORMATION.—When an offense is specifically described or defined by the statute, it is sufficient for an information to charge it in words of the statute; and an information is sufficiently definite, when it apprises the defendant of the charge which he is called upon to meet. An information charging cruelty to animals is *held* sufficient herein under these rules. *The State v. Haley, 520.*

18. ———. As an assistant prosecuting attorney acts upon his official oath, it is unnecessary for him to verify an information filed by him. *Ib.*

19. DEADLY WEAPON—CONSTABLE'S BAILEE—SHOTGUN ARGUMENT.—In resisting aggression on one's property the law justifies no greater force than is necessary to the exercise of reasonable and proper judgment to prevent the consummation of the injury, and a constable's bailee is not justified in a rude, angry and threatening exhibition of a shotgun to protect the bailed property without occasion or excuse therefor. *The State v. Martin, 609.*

20. INFORMATION FOR DISTURBANCE OF THE PEACE.—An information for the disturbance of the peace of the neighborhood by the defendant is sufficient, if it follows the language of the statute. *The State v. Ramsey, 668.*

21. ——— VERIFICATION.—An information filed by the prosecuting attorney is filed on his official oath, and need not be verified. *Ib.*

CRIMINAL PROCEDURE.

CONVICTION OF LESSER OFFENSE.—Though the indictment be for a felony—as an assault to commit rape—the conviction may be of a simple assault. *The State v. White, 285.*

CUSTODIA LEGIS. See REPLEVIN, 3.

CUSTOM. See EVIDENCE, 6.

DAMAGES. See ATTACHMENT, 4, 5, 6; CONVERSION, 3.

1. DAMAGES FOR WRONGFUL ATTACHMENT—COUNSEL FEES.—In an action for damages for a wrongful attachment, only such counsel fees can be recovered as were incurred in obtaining the dissolution of the attachment. Accordingly, it was *held* in this cause, wherein the attachment was dissolved on the hearing of the plea in abatement, that it was erroneous to admit proof of the amount of all the counsel fees in the case. *Fry v. Estes, 1.*

2. RAILROADS.—In an action against a railway company for double damages for the killing of a bull, which was more valuable for breeding purposes than for meat, such greater value should be taken into consideration in the assessment of the damages. *Young v. Railroad, 530.*

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DECEIT.

REPRESENTATION OF VENDOR—ACTION.—There are three phases in which a case of false representations may appear: *First*, the vendee may be induced to make a purchase relying solely and alone on the false representations of the vendor; *second*, he may be induced to make the investment by the combined false representations of the vendor and certain information received from some other source; or, *third*, although the vendor may have made such false statements, yet the vendee may not trust them, and may act alone from information received from such other sources. In the *first* and *second* cases the vendee is entitled to his action; in the *third* he is not so entitled. *Becraft v. Grist, 586.*

DEFENSES. See JUDGMENTS, 1; LANDLORD AND TENANT, 2.

DEFINITIONS.

1. SOLVENCY.—Solvency consists not only of the present ability of a debtor to pay his debts, but of his being in such condition of his means that payment may be enforced. *Reed, Murdock & Co. v. Lloyd, 278.*
2. DRUGGIST.—A druggist, according to chapter 58, Revised Statutes, 1889, is one who is registered as such. *The State v. Baskett, 389.*
3. OFFICER DE FACTO.—The following definitions occur in the opinion: An officer *de facto* is no other than he who has the reputation of being such, and yet is not a good officer in point of law; an officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interest of the public and third persons. *Simpson v. McGonegal, 540.*

DELIVERY. See CONTRACTS, 4.

DELIVERY BOND. See REPLEVIN, 3.

DESCRIPTION. See MECHANIC'S LIEN, 5, 6.

DRUGGISTS. See CRIMINAL LAW, 1, 2, 13, 14; DEFINITIONS, 2.

ELECTION. See EVIDENCE, 12; REMEDIES, 1, 2, 3.

ESTOPPEL. See PRINCIPAL AND AGENT, 5.

ACTION BY WIFE FOR DEATH OF HUSBAND—ESTOPPEL—RELIANCE ON REPRESENTATION.—Where a mother acts as next friend for her children in an action by them for the death of their father, the fact that the petition alleges that the mother has failed to sue within the period of six months, to which her right of action is limited, will not estop the mother from denying the truth of that allegation in proceedings on her part against the same defendant, if the defendant has not acted upon the allegation to his prejudice, as where there has been neither compromise of the action of the children, nor a judgment therein against the defendant. *Reichla v. Gruensfelder, 43.*

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EVIDENCE. See ATTORNEY AND CLIENT, 1; INSURANCE, 2; WITNESSES, 3.

1. VALUE OF CROPS AND FARMING IMPLEMENTS—EXPERT EVIDENCE. Witnesses, shown to be farmers of many years' experience, are *prima facie* qualified to testify in regard to the value of crops, cattle and farming implements. If, on their cross-examination, it appears that they are not familiar with the value of the grain or cattle, because they had not seen them, or for other reasons, that will not put the trial court in the wrong for admitting their testimony in the first instance. *Fry v. Estes, 1.*

2. INFRINGEMENT OF TRADEMARK—INSPECTION—EXPERT EVIDENCE. While the main test of the alleged resemblance is an inspection by the court of the original trademark and of the alleged infringement, nevertheless, in determining whether an ordinary customer, having neither the opportunity for comparison nor the time for examination, would be likely to be deceived by the similarity, the opinion of witnesses familiar with the trade, and the habits of the customers, is of weight, and, when aided by evidence of actual deception, should be controlling, unless the dissimilarity between the two marks is such as to exclude any probability of deception. *Tobacco Co. v. Tobacco Co. 10.*

3. LEADING QUESTIONS.—It is within the discretion of the trial court to permit leading questions in the examination of a witness. *Carder v. Primm, 102.*

4. IMPEACHMENT OF WITNESS——LAYING FOUNDATION.——When it is sought to impeach a witness by proof of his prior declarations, inconsistent with his testimony, a foundation must be laid therefor by directing the attention of the witness to such prior declarations, so as to afford him an opportunity to say whether he made them, and to explain them, if made. *Ib.*

5. COMPETENCY OF DECLARATIONS OF A CO-CONSPIRATOR.—In order to render the declarations of a stranger to the action competent evidence, on the ground that he was a co-conspirator of the party against whom they are offered, there must first be some proof of the existence of the conspiracy. Such proof may be circumstantial, but it must do more than raise a bare suspicion of a possible conspiracy. *Hart v. Hopson, 177.*

6. CUSTOM—RECORD.—On the record in this case it was proper to admit evidence of custom in relation to contracts like the one involved. *Hunt & Booth v. Hunter, 263.*

7. WHETHER GOODS PAID FOR—HARMLESS ERROR.—Where the purchaser's good faith is in issue, whether he thought the goods bought were paid for may, if properly connected, be pertinent, but in this case its rejection in evidence is harmless, since he testified he knew of no debts except those he assumed. *Pierson v. Slifer, 273.*

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8. AGE—INTEREST OF DEFENDANT AS WITNESS—INSTRUCTION.—It is not error to tell the jury, in passing on the question of whether defendant was of age at time of making the note in controversy, that they might consider his testimony in relation thereto, his interest in the result and his motive, if any, for his testimony. *Lovell v. Davis, 342.*

9. UNCONTRADICTED—INSTRUCTION.—On the record in this case, it was not error to tell the jury they were not bound to believe the declarations of any witness, because such declarations were uncontradicted; they might believe or disbelieve them as it might appear from all the facts to be true or untrue. *Ib.*

10. PAROL TO VARY WRITTEN CONTRACT.—Defendant, who introduced a written agreement proving that a certain note should be applied toward the payment of a certain judgment, cannot be permitted to vary the same by showing by parol that said note was to be applied to the liquidation of the matter in dispute, there being no plea of modification of the contract, or any pretense of fraud or mistake. *Deuser v. Hamilton, 394.*

11. ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—Defendant and his attorney were present at a settlement with plaintiff's firm, and the attorney made certain *memoranda* of the settlement showing the application of certain notes and credits. *Held*, such *memoranda* were not privileged, but were admissible in evidence on the part of plaintiff, following *Deuser v. Walkup*, 43 Mo. App. 625. *Ib.*

12. ELECTION OF REMEDIES.—*Held*, in this case, that plaintiff cannot save itself from the consequences of the election by proving that the attachment suit was hastily brought without deliberate consultation with its attorneys, and with a misconception of its rights and remedies. *Johnson-Brinkman Com. Co. v. Railroad, 407.*

13. COUNSEL FEES IN ATTACHMENT—NOTES.—In an action on an attachment bond the plaintiff may give in evidence the notes she had given for counsel fees in the attachment suit, which, though not conclusive, are admissible along with other evidence. *The State ex. rel. v. Gage Bros. & Co., 464.*

14. NEGLIGENT DRIVING IN STREET—ORDINANCE.—In an action for injuries negligently produced by rapid driving of a team in the street, an ordinance regulating the speed of teams is properly admitted in evidence as bearing on the negligence of the driver and the contributory negligence of the plaintiff. *Sandifer v. Lynn, 553*

15. EXPERTS—RULE.—An expert may give an opinion based on a state of facts he himself has witnessed, or which are detailed to him by other witnesses, or which are put to him in the form of a hypothetical case, and may give his reason therefor. The subject must be one of science or skill, or one which observation and experience has given an opportunity and means of knowledge which exists in

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reason rather than descriptive facts, and, hence, cannot be intelligently communicated to others not familiar with the subject so as to possess themselves of a full understanding of it. Hypothetical questions must be within the confines of the evidence and pertinent to the theories which the parties are endeavoring to uphold. *Riley v. Sparks Bros.*, *572.*

16. IMMATERIAL ANSWER.—Though a question be improper, if the witness' answer be immaterial, no injury results. *Baker v. Railroad, 602.*

17. CONVERSION —OWNERSHIP OF THIRD PARTY.—In an action for conversion, it is immaterial whether a witness, a third party, claim or disclaim the converted property, and his answer to such questions tends to prove no issue in the case. *Ib.*

18. PRIMA FACIE CASE.—The evidence in this case makes a *prima facie* case, and entitles plaintiff to go to the jury. *Ib.*

19. INSTRUCTIONS BASED ON.—The jury should be instructed to find from the evidence, but, where those words are omitted from the instructions, they are considered as implied. *Ib.*

EXEMPTIONS. See ATTACHMENT, 1; GARNISHMENT, 1; WAIVER, 1.

EXPERT. See EVIDENCE, 1, 2, 15; WITNESSES, 1, 2, 3, 4.

FELONY. See CONTRACTS, 1.

FENCES AND INCLOSURES. See CRIMINAL LAW, 10.

FIRES. See NEGLIGENCE, 9, 10, 11.

FORCIBLE ENTRY AND DETAINER.

1. APPEAL.—An appeal from the judgment of a justice of the peace, in an action of unlawful detainer, must be taken and perfected in the manner prescribed by special statutory provisions in regard thereto; the statutes in relation to appeals from justices in ordinary proceedings have no application. Accordingly, when such an appeal is taken from a judgment rendered during the term of the circuit court to which it is returnable, it is essential to its validity that it should be perfected by the filing of the requisite affidavit and recognizance with the justice within six days after the rendition of the judgment. *Hastings v. Hennessey, 172.*

2. ACTUAL FORCE—INSTRUCTION.—No actual force against plaintiff's possession is necessary to maintain the action of forcible entry and detainer, and an instruction set out in the opinion was properly refused. *Wylie v. Waddell, 226.*

3. COMMON INCLOSURE—INSTRUCTION.—A common inclosure of a number of fields owned by different parties and pastured in common will not destroy such an actual possession of either field as to defeat an action of forcible entry and detainer, and an instruction set out in the opinion *held* properly refused. *Ib.*

FRAUD. See BILLS AND NOTES, 6; SALES, 5.

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FRAUDS AND PERJURIES.

1. STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—VALIDITY AGAINST UNNAMED PRINCIPAL.—When the memorandum of a contract for the sale of realty is entered into by one of the parties thereto as agent for a third person who is not named herein, and this appears upon the face of the memorandum, parol evidence is admissible, notwithstanding the statute of frauds, to show who the unnamed principal is for the purpose of binding him. *Mants v. Maguire, 136.*

2. PRINCIPAL AND AGENT—IMPLIED WARRANTY OF AUTHORITY OF AGENT—DAMAGES.—One who enters into a contract as the agent of another person impliedly warrants his authority to act; but where he acts without authority the other contracting party is not entitled to damages for the loss of the bargain, if the contract would have been insufficient to bind the principal, even if authorized, as where it fails to satisfy the requirements of the statute of frauds. [Per BIGGS, J., *dissenting*.] *Ib.*

3. STATUTE OF FRAUDS—MEMORANDUM OF CONTRACT FOR THE SALE OF REALTY.—A memorandum of a contract for the sale of realty is insufficient under the statute of frauds, if it fails to name or describe the vendor; such deficiency cannot be supplied by oral evidence showing who the vendor is. *Ib.*

4. SALES OF REAL ESTATE—CONTENTS OF CONTRACT.—Whether an agreement for the sale of real estate be witnessed by a formal contract, or by a memorandum, in either case the paper must, under the statute, contain the whole agreement. And *held, arguendo,* that the seller or buyer of the land cannot be filled in by parol, nor one piece of property be inserted for another. The Missouri cases are discussed and distinguished. *Bucker v. Harrington, 481.*

5. ——— SUBSEQUENT ORAL CONTRACT.—A contract for the sale of lands cannot be varied by a subsequent oral agreement, as that the buyer agreed to take a less perfect title than that called for in the contract in consideration of an earlier giving possession than originally agreed. *Ib.*

6. ——— SUBSTITUTED PERFORMANCE.—There may be an executed performance substituted instead of the performance required in the contract, if it be accepted and accomplished, but a verbal agreement for substituted performance of a written contract for the sale of real estate cannot be enforced for the same reason that an oral contract, or a subsequent oral modification of a written contract, cannot be enforced. *Ib.*

FRAUDULENT CONVEYANCES.

1. PARTICIPATION IN FRAUDULENT DESIGN.—One who purchases of a vendor, selling with intent to hinder and delay his creditors, will not be a *bona fide* purchaser, if he participates in the fraudulent purpose of his vendor, or knew of his intent, or of facts sufficient to put him on his inquiry. *Pierson v. Slifer, 273.*

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2. KNOWLEDGE BEFORE PAYING PURCHASE MONEY—NOTE.—Though the purchaser of a fraudulent vendor did not know of his fraudulent design at the time of the purchase, yet, if he knew thereof before paying the purchase money, he will not be protected; but this rule will not apply where a note is given for a part of the purchase, which before due has passed into the hands of an innocent party. *Ib.*

3. CHATTEL MORTGAGES—STOCK IN TRADE—KEEPING PROCEEDS.—If it is agreed between the mortgagor and the mortgagee that the former should sell the mortgaged merchandise in the usual course of trade, and keep all the proceeds of such sales for his own use, except enough to pay the mortgagee's debt, the mortgage is fraudulent and void as to creditors. *Helm v. Helm, 615.*

GARNISHMENT. See WAIVER, 1.

RIGHT OF EXECUTION DEBTOR TO EXEMPTIONS OUT OF FUND PAID INTO COURT.—An execution debtor is entitled to claim his exemptions out of funds paid into court by his debtor as garnishee under the execution. *Marchildon v. O'Hara, 523.*

GUARANTY.

1. KNOWLEDGE OF ACCEPTANCE.—Where a contract is made engaging a traveling salesman at one time in one state, and, some days thereafter in another state, he secures the signatures of defendants to the guaranty provided for in the contract of employment, which he forwards to plaintiff, *held*, the two contracts are not contemporaneous. And it is suggested that defendants are entitled to notice of their acceptance as guarantors. *Tolman Co. v. Means, 385.*

2. ———. Where the guarantor knows, as a matter of fact, he is accepted as such, he is bound. Knowledge is the material matter; no form or special channel of notice is needed. *Ib.*

GUARDIAN. See REPLEVIN, 2.

HUNTING. See CRIMINAL LAW, 8, 9, 10, 11, 12.

HUSBAND AND WIFE. See ATTACHMENT, 1.

1. ACTION FOR MAINTENANCE.—A wife is not entitled to relief in an action by her against her husband for maintenance, when she has left him without his consent and under circumstances which do not amount to an abandonment by him. *Droege v. Droege, 84.*

2. CONSTRUCTIVE ABANDONMENT BY HUSBAND.—*Held, arguendo*, that the wife is bound to follow the fortunes of her husband, and to live where he chooses, and in the style and manner which he may adopt; also, that, to justify an abandonment of the husband by the wife, his conduct towards her must have been such as would entitle her to a divorce. *Ib.*

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ILLINOIS. See COURTS.

INDICTMENT. See CRIMINAL LAW, 8, 9, 16.

INFORMATION. See CRIMINAL LAW, 13, 14, 17, 18, 20, 21.

INJUNCTION.

1. JUDGMENT—APPEAL OR WRIT OF ERROR.—To obtain relief from a judgment by injunction, it should appear that relief could not be had by ordinary legal procedure, as appeal or writ of error; and, where a writ of error is of sufficient efficacy to cure the complaint made in a given case, it should not be displaced by an injunction. *Wyman & Hardwicke, 621.*

2. ——— ———. Where a petition against a married woman declared on a debt contracted by her during coverture, and asked a judgment and lien on her sole and separate real estate described in the petition, and the judgment was simply a personal judgment, a writ of error would bring up sufficient record to reverse the judgment, and an injunction will not be granted against the enforcement of the judgment by execution, though there were irregularities on the part of the court in ordering the judgment entered, as that no opportunitv was given to take exceptions or perfect an appeal. *Ib.*

INNOCENT HOLDER. See ALTERATION, 2; FRAUDULENT CONVEYANCES, 2.

INSTRUCTIONS. See EVIDENCE, 8, 9, 19; FORCIBLE ENTRY AND DETAINER, 2; NEGLIGENCE, 10; PRACTICE, APPELLATE, 11, 16, 17.

1. RIGHT OF JURY TO DISCREDIT WITNESSES. — An instruction to the jury declared that, if they believed any witness had wilfully sworn falsely as to any of the facts mentioned in the other instructions as bearing upon the claim sued on or the defenses thereto, they were at liberty to entirely disregard the testimony of such witness. *Held*, that the instruction authorized the jury to discredit only witnesses who had wilfully sworn falsely to material facts, and was proper. *Hart v. Hopson, 177.*

2. NO EVIDENCE.—Instructions without evidence to support them are properly refused. *Wylie v. Waddell, 226.*

3. ASSUMING UNCONTROVERTED FACT.—It is not error for an instruction to assume a fact which is not controverted nor issuable. *Houghland v. Dent, 237.*

4. PRESENTING NEW ISSUE—GIVEN IN OTHERS.—It is not error to refuse an instruction presenting an issue not in the case, or that is given in others. *Ib.*

5. VERDICT—APPELLATE PRACTICE.—Instructions set out in the opinion are approved; there was evidence to support the verdict, and the appellate court will abide the finding. *Keyes v. Bank, 323.*

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6. Assuming fact.—An instruction need not submit a fact to the jury when it is practically admitted. *Ib.*

7. Extending the issues.—An instruction, though well enough in itself, which exceeds the limits of the defense pleaded in the answer, is fatally vicious. *Aultman & Taylor Co. v. Smith, 351.*

8. Covered in others—harmless error.—It is not error to refuse an instruction covering the same ground as others given, and to refuse instructions which might have been given is not reversible, when no harm follows. *The State ex rel. v. Gage Bros., 464.*

9. Covering same ground.—It is not error to refuse instructions covered in others given. *Garrison v. Graybill, 580.*

10. Party's right to what kind.—The litigant is entitled to go to the jury on clear and unambiguous declarations of the law, and if he asks such instructions they ought to be given. *Becraft v. Grist, 586.*

11. Evidence.—An instruction without evidence to support it is properly refused. *Baker v. Railroad, 602.*

12. A fact in issue.—Instructions should not demand a verdict without regard to matter on which the case is built. *Helm v. Helm, 615.*

INSURANCE.

1. Reformation of policy—laches of insured.—It is the duty of the insured to promptly examine a fire insurance policy, when he receives it, and to see whether it corresponds with the agreement made therefor. He will not be entitled to the reformation of the policy, so as to make it conform to alleged oral agreements on the part of the soliciting agent of the insurance company, if he retains the policy without objection for an unreasonable time; nor will the inability of the insured to read alter the effect of such retention. *McHoney v. Ins. Co., 94.*

2. Preponderance of evidence.—Such oral agreements were established by the unsupported testimony of the insured alone, and his testimony was contradicted on every material point by that of the soliciting agent of the insurance company, who, moreover, at the date of the trial, was wholly disinterested. *Held*, that the preponderance of the evidence was, therefore, with the insurance company. *Ib.*

INTERPLEA. See Attachment.

JUDGMENTS. See Remedies, 3.

1. Limitations—revivor—scire facias—defense.—Plaintiff obtained judgment against defendant, in 1861, on personal service, in the state of Pennsylvania, which was revived in 1891 on a writ, and an *alias* writ of *scire facias*, with return of *nihil* to each. *Held*:

(1) The limitation began to run from the date of the revival instead of the original judgment.

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(2) The proceeding by *scire facias* is a further proceeding in the same action, and is based on the original judgment, and not a new action.

(3) That at common law two returns of *nihil* were sufficient to warn the defendant.

(4) That the proceedings in Pennsylvania to revive the judgment being regular under the common law, which is presumed to be in force there, will support the revival so as to form a new period of limitation and support an action in this state, notwithstanding a want of personal service.

(5) That the defendant, in a suit on said revived judgment, since it is without personal service, may show in defense anything (except limitation) going to discharge him from the original judgment occurring since its rendition. *Krauts v. Preston, 251.*

2. FINAL—APPEAL.—It is ruled on the authority of *Moody v. Deutch*, 85 Mo. 237, that the judgment in this case would sustain an appeal. *Cherry v. Railroad, 499.*

3. VALID IN ONE STATE, VALID IN ALL.—Under the constitution of the United States, judgments duly authenticated according to the act of congress shall have such faith and credit given them in every court as they have by law or usage in the courts of the state whence such record shall be taken. *Kincaid v. Storz, 564.*

4. COLLATERAL ATTACK—JURISDICTION.—The record of a judgment of another state does not impart absolute verity, and is not conclusive as to the court's jurisdiction of the subject-matter, or of the person or thing in proceedings *in rem*. *Ib.*

5. ON BOND—HARMLESS ERROR.—While a judgment on a bond in form should be for the full penalty, with execution for the damages, yet this error does no harm, and is not reversible. *Leavel v. Porter, 632.*

JURISDICTION. See JUDGMENTS, 4.

1. TRADE MARK—APPELLATE—AMOUNT INVOLVED.—It appeared that the defendant had spent $10,000 in advertising its brand of goods, to which its trademark was affixed. The decree rendered in this court restrained the defendant from using the alleged infringement, or any colorable imitation of the plaintiff's trademark, but did not prohibit the defendant from advertising its brand of goods, and, moreover, permitted the defendant to change its trademark into a form theretofore agreed upon by it and the plaintiff. *Held*, on motion for a transfer of this cause to the supreme court, after the decision thereof by this court, that this court had jurisdiction of the appeal taken from the trial court herein. *Tobacco Co. v. Tobacco Co., 10.*

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2. APPELLATE JURISDICTION — COURTS OF APPEALS—MANDAMUS TO JUSTICE—TITLE TO LAND.—The court of appeals has no appellate jurisdiction to review the judgment of the circuit court in a *mandamus* proceeding to a justice of the peace to compel him to transmit the papers in a case pending before him to the circuit court, on the ground that the title to real estate was put in issue therein; the supreme court alone having jurisdiction to supervise and review the lower courts in proceedings in which the title to real estate is involved. (*State ex rel. v. Rombauer*, 101 Mo. 499, *followed, and Bennett v. McCaffrey*, 28 Mo. App. 220, *denied.) The State ex rel. v. Ganzhorn, 220.*

3. STATE JURISDICTION—CONCURRENT OVER MISSOURI RIVER, NOT OVER DESERTED BED.—The state of Missouri has concurrent jurisdiction over the entire channel of the Missouri river, while it forms a common boundary of this state and Nebraska, but where the river abandons its channel the jurisdiction extends only to the boundary line, the middle of the old channel before the change. *Cooley v. Golden, 229.*

4. ——— FORCIBLE ENTRY.—The concurrent jurisdiction over a river forming a common boundary is not believed to confer authority upon one state to bring forcible entry and ejectment for the recovery of land within the limits of the other. *Ib.*

JURY. See NEGLIGENCE, 7; PRACTICE, TRIAL, 3; SALES, 4, 7; VERDICT, 1

JUSTICES' COURTS. See PRACTICE, TRIAL, 2, 10, 11, 12, 13; REPLEVIN, 4.

1. TITLE TO LAND—INFORMAL AFFIDAVIT—DUTY OF JUSTICE.—Though the plea and affidavit attempting to inform the justice that the title to real estate is involved be informal, and fail to comply with the statute, yet, if the question decisive of the case is whether or not the plaintiff has the title, the jurisdiction of the justice ceases, and it only remains for him to perform the ministerial duty of transmitting the papers to the circuit court. *The State ex rel. v. Ganshorn, 220.*

2. RAILROADS—KILLING STOCK—CATTLE-GUARD—ALLEGATION.—A complaint before a justice of the peace for killing stock by reason of an insufficient cattle-guard should allege, *first,* there was a certain crossing over defendant's railway in a certain township; *second,* that adjacent thereto defendant had failed to erect and maintain proper cattle-guards, etc.; *third,* that by reason thereof plaintiff's mare passed from the crossing to the track, etc. *Jones v. Railroad, 382.*

3. ——— ——— ADJOINING TOWNSHIP.—Where an action before a justice of the peace for killing stock is brought in the township adjoining the one where the killing occurred, it should be so alleged in the complaint and shown by the evidence. *Ib.*

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LANDLORD AND TENANT.

1. ATTACHMENT FOR RENT—PLEADING—ABATEMENT OR BAR.—A plea in abatement to an attachment for rent among other things alleged that all the said rent had been fully paid. *Held*, the abatement was waived, and the plea was a plea in bar. *Houghland v. Dent*, 237.

2. ——— PROCEEDINGS—DEFENSES.—Proceedings in attachment for rent are the same as in other attachment suits, which suits are excepted out of the rule permitting the setting up by answer as many defenses and counterclaims as one may have. *Ib.*

3. ACCEPTANCE OF RENT—INSTRUCTION NOT HARMFUL.—Though rent corn is delivered in a manner different from that provided in the contract, yet if accepted by the landlord it is sufficient; and in this case appellant is *held* not injured by an instruction on this subject. *Ib.*

4. ATTACHMENT FOR RENT—LIEN ON CROPS—EVIDENCE.—To entitle the landlord to a lien on the crops it is incumbent on him to show affirmatively that the tenant who grew the crop was indebted to him for the rent for that year, and that such rent, if past due, was due and payable within eight months next preceding the attachment. *Beck v. Wisely*, 242.

LAW.

FOREIGN LAW—PRESUMPTIONS.—A foreign law must be proved like any other fact, and, in the absence of such proof, it will be assumed that the common law prevails in the foreign jurisdiction. *Roll v. Smelting & Mining Co.*, 60.

LAW AND FACT. See CONSTRUCTION, 1.

CONSTRUCTION OF WRITING.—The interpretation of writing is always for the court, except, *first*, where the writing is ambiguous, and the ambiguity must be solved by extrinsic unconceded facts, and, *secondly*, where the writing is merely adduced as containing evidence of certain facts from which different inferences may be drawn, and where it is for the jury and not for the court to draw the inferences; and *held* that the writings in question in this cause were within neither of these exceptions. *Mantz v. Maguire*, 136.

LIMITATIONS. See JUDGMENTS, 1.

1. PRINCIPAL AND AGENT—STATUTE OF LIMITATIONS.—With respect to a claim by a principal against his agent for money collected by the latter for him, the statute of limitations does not begin to run until the principal has notice of the collection, and possibly not until demanded by him. *Carder v. Primm*, 102.

2. MONEY HAD AND RECEIVED.—An action for money had and received is barred by the five years' limitation, and plaintiff's ignorance of his cause of action will not affect the running of the statute in the absence of concealment, etc. *Garrett v. Conklin*, 654.

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3. TRUSTS — MORTGAGEE AND ASSIGNEE.— While the mortgagee is trustee of his assignee of the note secured by the mortgage, such trust is within the statute, as only technical and continuing trusts fall without the statute. *Ib.*

LOCAL OPTION. See CRIMINAL LAW, 2.

MANDAMUS.

1. CORPORATION PERFORMING A PUBLIC FUNCTION.—Where a citizen complies with all the requirements of the ordinance granting as a franchise to a corporation the exclusive right to discharge certain duties, as furnishing water, and the corporation refuses, *mandamus* will lie to compel the performance of the duty, there being the presence of a specific legal right and the absence of an effectual legal remedy. *The State ex rel. v. Joplin Water Works, 372.*

2. VARIANCE BETWEEN ALTERNATE AND PEREMPTORY.—A peremptory writ can go no further nor vary in any substantial particular the alternative, but such departure must be material to be fatal. *Ib.*

MARRIED WOMEN. See CONTRACTS, 4; INJUNCTION, 2.

MASTER AND SERVANT.

1. NEGLIGENCE OF MASTER: SUFFICIENCY OF THE EVIDENCE.—The evidence in this cause is considered, and is *held* adequate to warrant a recovery for negligence of the master in furnishing to the servant defective appliances and insufficient accommodations and quarters for the doing of work attended by risk. *Reichla v. Gruensfelder, 43.*

2. EXTENT OF OBLIGATION OF MASTER.—The obligations of the master towards his servant require him to furnish not only suitable tools and appliances and competent fellow-servants, but also a reasonably safe place for the doing of the work demanded of the servant. *Ib.*

3. OBVIOUS DEFECTS—RISKS ASSUMED BY SERVANT.—When a servant is engaged in work under the orders of the master, and is injured in consequence of obvious defects in the instrumentalities furnished therefor, the master is responsible for the injury only upon proof either that the danger attending the execution of the master's orders was not fully appreciated by the servant owing to the want of time for consideration, or that the increased danger by reason of the defective agencies was not so imminent and threatening as to require the servant to abandon the service. *Ib.*

4. OBLIGATION OF MASTER TO FENCE DANGEROUS MACHINERY.—Even in the absence of a statutory provision for the fencing of dangerous machinery, the obligation, which the law imposes upon the owner of the premises to guard persons lawfully there against pitfalls, may be applied between a master and his servant, and a failure to comply therewith may, under the circumstances of particular cases, warrant the inference of negligence. *Ib.*

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5. ——— EFFECT OF GENERAL PRACTICE.—When such fencing can be resorted to without inconvenience, and its absence renders the machinery unnecessarily dangerous, the existence of a practice to use the machinery without it will not prevent the inference of negligence. *Ib.*

6. ASSUMPTION OF RISK.—If a servant, capable of contracting with notice of the risk, undertakes a hazardous employment, the master incurs no liability for injuries received therefrom. *Watson v. Kansas & Texas Coal Co, 366.*

7. ——— DEFECTIVE MACHINERY—LATENT AND PATENT.—If the servant knows the machinery or implement he uses is defective, and continues to use it, he assumes the risk, but he is not required to search for latent defects, but may assume the machinery sufficient; however, he must observe patent defects, and opportunity to know defects is counted to him as knowledge thereof. *Ib.*

8. ——— KNOWLEDGE OF DANGER.—A servant does not assume the risk unless he knows not only the condition of things, but also the danger that exists in such condition; but, if the danger is obvious, the condition need only be shown. *Ib.*

9. ——— ———. An experienced miner of mature years is presumed to know what common observation teaches, *e. g.*, the operation of gravitation, the effect of blasting on columns, stubs and roof of a mine, and the danger of a loosened rock in the roof; and where the danger is as well known to the servant as to the master the former assumes the risk. *Ib.*

10. FACTS CONSTITUTING RELATION FOR THE JURY.—Defendant's superintendent did not engage the driver for any definite time. He took the team out of an evening and on return in the morning turned over to the superintendent all the earnings, and at the end of the week he received one-third of what he turned in during the week as compensation. When out he served anyone who chose to hail him. The superintendent could dismiss him at any time, and directed when he could or could not take the carriage out. *Held*, it was properly left to the jury to decide whether the driver was defendant's servant or not. *Sandifer v. Lynn, 553.*

11. ——— INDEPENDENT EMPLOYMENT. Several cases presenting the doctrine of independent employment are distinguished and *Fink v. Furnace Co.*, 82 Mo. 276, and a Pennsylvania case are *held* not applicable to the case the record here discloses. *Ib.*

MECHANICS' LIENS.

1. EXCESS IN ACCOUNT.—A lien account was for $900, due for lumber in a building; in fact there was only $500 worth of lumber used. The excess was in separable items, and it did not appear that anyone was defrauded or injured thereby. *Held*, such excess did not defeat the lien, as the lienor did not knowingly and intentionally file an untrue and unjust account. *Midland Lumber Co. v. Kreeger, 418.*

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2. Liens against railroads—pleading—variance.—Both the lien filed against a railway company for work done in the construction of its road, and the petition in an action for the enforcement of it, should state the facts showing that the work was performed by the lienor under contract either with the railway company or its agent, or with one of the contractors or subcontractors therefor; and these statements should substantially agree. But *held* that it was not a variance to state in the lien that the lienor contracted with the railway company, and in the petition that he contracted with a corporation acting in the premises as the agent or trustee of the railway company. *Mackler v. Railroad, 516.*

3. Pleading—account—variance.—Materials were furnished for three houses on three contiguous lots at a lumping agreed price of $525. A lien account for the material in one house at a lumping price of $175 was filed. The petition alleged the sale and delivery of all the material at the lumping price, but set out the mistake in the account, and asked the enforcement of the lien for $175. *Held,* the variance between the account sued on and the account set out in the lien paper was fatal. *Poppert & Son v. Wright, 576.*

4. Lien account governs—prior incumbrance.—A lienor must stand or fall by the lien which he files, and the dates and items and amounts which he specifies, and is not at liberty to defeat or postpone a prior lien or incumbrance by matter *in pais*. *Ib.*

5. Description of premises.—The description of property to be affected by a mechanics' lien need not be perfect, but only sufficiently so to enable a party familiar with the locality to identify the premises with reasonable certainty; and a description, "on forty-three hundredths of an acre, seven hundred and thirty-five feet north of the center of the section, being a portion of ten acres purchased of R., belonging to C. and having C.'s elevator on it," is sufficient, and is not vitiated by the mistake in the distance from the center of the section. *Fairbanks v. Elevator Co., 627.*

6. Description of premises granted—rule.—Where there are certain premises once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistakeh, will not vitiate the grant. *Ib.*

MERCHANTS EXCHANGE. See Negligence, 3, 4, 5.

MISDEMEANOR. See Criminal Law, 12.

MISTAKE. See Mortgages, 1.

MONEY HAD AND RECEIVED. See Contracts, 5; Principal and Agent, 6.

1. Action for.—The action for money had and received will lie in general wherever the defendant has received the money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. *Winningham v. Fancher, 458.*

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2. LIMITATION.—An action for money had and received is barred by the five years' limitation, and plaintiff's ignorance of his cause of action will not affect the running of the statute in the absence of concealment, etc. *Garrett v. Conklin, 654.*

MORTGAGES.

FORECLOSURE—LEGAL TITLE—MISTAKE—SUBROGATION.—A mortgagee foreclosed his mortgage by sale, at which the mortgagor's son bid in the land and received a deed, though he paid nothing, and conveyed to his father who negotiated a loan and mortgaged the premises to the loan company. The company paid the mortgagee the son's bid. *Held:*—

(1) The sale and the son's conveyance did not pass the legal title to the father, but only the right to redeem from a second mortgage.

(2) Had the son paid his bid, under the facts of the case, he would have become the owner only of the equity of redemption, and the second mortgage would have become a first lien.

(3) As the mortgagor, mortgagee and the loan company all believed that the foreclosure sale and subsequent conveyance of the son had conveyed to the father the unincumbered legal title, the loan company should be subrogated to the right of the first mortgagee to the amount of the foreclosure sale, as against the second mortgagee.

(4) *Arguendo*, that subrogation proceeds on the theory that the mortgage debt is paid. *Moore v. Lindsey, 474.*

MUNICIPAL CORPORATIONS. See EVIDENCE, 14; NEGLIGENCE, 6, 7, 8.

1. PARTIALITY OF ORDINANCE—PRESUMPTION.—The courts will pronounce valid and inoperative an ordinance found palpably unreasonable, partial and not general, but unjustly discriminating; but partiality, unfairness or oppression must be clear, as the presumption is quite strong in favor of the validity of municipal legislation. *Kansas City v. Sutton, 398.*

2. ORDINANCE NOT VOID.—Police regulations are not to be condemned because not specifically aimed at all persons in whatever business engaged, as they may have an express design of reaching certain classes in certain characters of work. An ordinance fixing the *maximum* load of a two-horse team and wagon, and prescribing a penalty against the contractor employing such team for exceeding such *maximum*, is not void on the ground of partiality. *Ib.*

3. OFFENSE AGAINST ORDINANCES OF A VILLAGE—COMPLAINT.—An arrest for an offense against the ordinances of a village may be made by the marshal of the village without a warrant, when the offense is committed in his presence; and in such case the offender may be prosecuted under a charge preferred orally by the marshal. *The Village of Oran v. Bles, 509.*

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4. COUNCIL DE FACTO—ACTS VALID.—An ordinance of the Kansas City council authorizing certain street improvement, and passed while the four Westport wards were represented in the council, is valid, though such Westport wards were not part of the city, and its representatives were not *de jure* members of the council, and though such representatives voted for the ordinance, and without their vote it failed of the necessary majority. *Simpson v. McGonegal, 540.*

NEGLIGENCE. See BILLS AND NOTES, 4; MASTER AND SERVANT, 1, 2, 3, 4, 5; RAILROADS, 3, 4, 5, 6, 7, 8.

1. STREET RAILWAYS — CONTRIBUTORY NEGLIGENCE OF TRAVELER INJURED ON HIGHWAY.—When a traveler on the streets of a city approaches a street railway operated by cable — in this cause he knew that the railway was being thus operated — it cannot as a matter of law be ordinarily regarded as his duty to stop; but he is bound to make a fair exercise of his faculties before driving upon a point of danger, and, to this end, he is bound to listen for the customary signal, and to look for the approach of trains, unless his view is obstructed, and a failure so to do will constitute contributory negligence upon his part, if he is injured in consequence. *Smith v. Citizens Ry. Co., 36.*

2. ——— ——— LIABILITY OF STREET RAILWAY COMPANIES.—Notwithstanding such contributory negligence on the part of the injured traveler, the street railway company will be responsible for injury caused to him through a collision with one of its trains, if the person in charge of such train saw him in time to have averted the injury, or by the exercise of ordinary and reasonable care in keeping a lookout in front of him, might have discovered him at the point of danger in time to have avoided the injury. But *held* that the evidence in this cause did not establish such ground for liability. *Ib.*

3. MERCHANTS EXCHANGE — NEGLIGENCE OF CLERK — SUFFICIENCY OF EVIDENCE.— Auction sales were made at the call board of a merchants exchange among the members thereof, and it was the duty of a clerk to keep a record of them; but the accurate performance of this duty was extremely difficult, since bidding was very rapid, and great confusion attended the transactions. *Held* that the failure of the clerk to record a sale warranted a finding of negligence on his part. *Warren v. Merchants Exchange, 157.*

4. ——— ——— EVIDENCE OF CONTRIBUTORY NEGLIGENCE OF MEMBER. The member making the sale did not examine the record, in order to assure himself of the entry of the transaction. *Held*, that this did not conclusively establish contributory negligence on his part, notwithstanding that it was the general practice of members to make such examination daily. *Ib.*

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5. ——— ——— LIABILITY OF EXCHANGE.—These auction sales were made at a call board, and only members who paid an extra charge for the privilege could participate in them. The clerk and an auctioneer were employed and paid by the exchange, which was a corporation. *Held* that under the evidence the exchange only undertook to afford such of its members as wished to avail themselves thereof facilities for trading among themselves, and did not intend to conduct the auction so as to become responsible for the mistakes of its appointees in charge thereof, and, therefore, that it could not be held for the failure of the clerk to record a sale in the absence of proof of negligence in the appointment of him. *Ib.*

6. RAPID DRIVING IN STREET.—Driving at the rate of ten miles an hour, in violation of an ordinance, alongside of a street car, and without attempting to check the team when the car is being stopped, is negligence, and a defendant cannot complain of its being submitted to the jury. *Sandifer v. Lynn, 553.*

7. CONTRIBUTORY NEGLIGENCE, WHEN JURY QUESTION.—Where the act charged to be negligence will admit of different inferences or constructions, it is properly left to the jury; and, in view of the rate of speed horses are ordinarily driven in crowded streets, and the control which is usually exercised over them, to determine what precautions are necessary to prevent being run over, is commonly a matter of fact and not of law. *Ib.*

8. ——— VIOLATION OF ORDINANCE.—Pedestrians about to enter the streets are not at fault in expecting that the ordinances regulating the speed of a team will be observed. *Ib.*

9. FIRE—THRESHING ENGINE.—After a threshing machine had run a short time, fire was communicated from its engine to the plaintiff's stacks. After it was extinguished plaintiff acquiesced in the opinion of the defendant that the machine might be operated with the damper of the engine down, but did not agree to running it with the damper open, nor did he know of the defendant's intention to so operate it. Defendant knew it was dangerous to so operate it during the prevailing high winds, and opened the damper and increased the draught which carried the sparks into the wind, and so against plaintiff's stacks. *Held,* he was guilty of gross negligence. *Garrison v. Graybill, 580.*

10. ——— INSTRUCTIONS.—An instruction presenting the conditions of defendant's liability is summarized in the opinion and approved. *Ib.*

11. CONTRIBUTORY NEGLIGENCE.—*Held,* on the facts of this case, that plaintiff neither concurred in nor contributed to the negligence which directly caused the destruction of his stacks. *Ib.*

12. UNCOUPLING CARS—CONTRIBUTORY NEGLIGENCE—BRAKEMAN AS CONDUCTOR.—In the absence of the conductor, the brakeman was in charge of a train engaged in switching near a switchhead, and the

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train was moved on his signals. After setting the cars in motion and observing their rate of speed, he made one attempt to uncouple and desisted, and then, without ordering or signaling a slowing up, again attempted to uncouple when he knew that to do so involved the necessity of his going with the cars at their rate of speed. There was no emergency or necessity existing requiring such action. He was killed, and his body was found on one of the main rails about fifty or sixty feet from where he entered the track. *Held:*—

(1) He was guilty of contributory negligence such as to defeat a recovery by his representative, though there was evidence tending to show his foot was caught in the unblocked place between the guard and the main rail.

(2) Whether he could or could not readily and quickly pull the coupling pin is immaterial, as, in either event, he was guilty of negligence in remaining between the cars going at such rate for such distance and until he reached the guardrail. *Towner v. Railroad, 648.*

13. SPEED OF TRAIN—ORDER—RULES.—The question of negligence in any particular case must be governed by the facts and circumstances which pertain to the case as made, and the facts that deceased regulated the speed of the train by his orders, and in violation of the rules of the company went between the moving cars, are elements of contributory negligence. *(Waldhier Case,* 87 Mo. 37, *and other cases distinguished.) Ib.*

NEW TRIALS. See CONSTITUTIONAL LAW, 1; PRACTICE, APPELLATE, 13.

NEWLY DISCOVERED EVIDENCE—AFFIDAVIT.—In passing upon the question of granting a new trial newly discovered evidence will not be considered unless supported by affidavit. *Lovell v. Davis, 342.*

OFFICERS. See CRIMINAL LAW, 9; SHERIFFS, 1.

DE FACTO OFFICE AND OFFICER—RULE.—To render valid the acts of an officer *de facto,* it is not always necessary that there should be an office *de jure;* the rule rests rather on the color of the right appearing in the acting officer, and not upon any difference between a *de facto* and *de jure* office. *(Following Adams v. Lindell,* 5 Mo. App. 197; S. C., 72 Mo. 198.) *Simpson v. McGonegal, 540.*

ORDINANCES. See MUNICIPAL CORPORATIONS, 2.

PARENT AND CHILD. See REPLEVIN, 2.

CONTRACT—PRESUMPTION.—Where a daughter from her birth to her father's death lived with him, and for the sixteen years after her majority there was no apparent change of her relation from child to that of servant working for wages, loose declarations of affection or gratitude with the expressed intention to leave her the farm will not bind the estate for such services, which are presumed to have

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been gratuitous; and, before recovery can be had therefor, there must be an understanding at the time that one was to pay and the other was to receive pay therefor. *Louder v. Hart, 381.*

PAYMENT. See SALES, 9.

PHARMACISTS. See CRIMINAL LAW, 13, 14.

PHYSICIANS. See CRIMINAL LAW, 15.

PLEADING. See CORPORATION, 15; COURTS, 2; MECHANICS' LIEN, 3, 4; PRACTICE, TRIAL, 14; RAILROADS, 11; REPLEVIN, 5, 6.

POSSESSION. See CONVERSION, 3.

PRACTICE, APPELLATE. See FRAUDS AND PERJURIES, 1; INSTRUCTIONS, 5.

1. COSTS.—In a suit in equity the question of the costs of an appeal is to some extent within the discretion of the court. In this cause, wherein the respondent was successful on the main issue, they were taxed against the appellant and respondent in equal shares. *Roll v. Smelting & Mining Co., 60.*

2. RECITAL IN TRANSCRIPT OF OFFICIAL CHARACTER OF A JUSTICE OF THE PEACE.—The official character of a justice of the peace, before whom an action for the killing of stock has been instituted, is established *prima facie* by a recital thereof in the transcript on appeal. *Burger v. Railroad, 120.*

3. CHANGE OF THEORY ON TRIAL.—A party cannot try his case on one theory in the trial court, and upon another on appeal. *Mantz v. Maguire, 136.*

4. ———. In this cause the defendants were sued for damages for the want of authority on their part to make a written contract for the sale of land, which they had entered into as the agents of a third person. They pleaded only the general issue, raised no objection to evidence of the contract, made no specific objection to its validity, and themselves offered evidence with the view of showing authority on their part to make it. *Held, per curiam,* that they were not at liberty to contend on appeal that the contract was insufficient under the statute of frauds. *Ib.*

5. ———. But *held*, by BIGGS, J., *dissenting*, that the question of the validity of the contract under that statute was sufficiently raised by the asking of an instruction limiting the recovery of the plaintiffs to the amount of earnest money paid by them, since that was the extent of the right of recovery, if the contract was invalid. *Ib.*

6. ERROR FAVORABLE TO APPELLANT.—Appellant cannot complain of errors more favorable to him than to the respondent. *Houghland v. Dent, 237.*

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7. TRIAL BEFORE COURT—INSTRUCTION.—In trials by the court without a jury, the appellate court will not give that critical examination of instructions it otherwise would, since in such case the office of instructions is to merely show the theory of the court, and, if the instructions read together show that the court's view of the law was correct, there is no ground of complaint. *Hunt & Booth v. Hunter, 263.*

8. OBJECTIONS—EXCEPTIONS.—The statement in a brief that certain matters were admitted or proven cannot dispense with objections to testimony, and exceptions taken. *Ib.*

9. REVIEWING FACTS.—When the cause is tried before the court without a jury, the appellate court will no more interfere with the finding of facts than with the verdict of the jury. *Pierson v. Slifer, 273.*

10. INSTRUCTIONS—MOTION FOR A NEW TRIAL.—The complaint that a finding in replevin was excessive by two barrels of whiskey will not be noticed in the appellate court, when no such point was made by instruction or in the motion for a new trial, and the statement in the motion that the verdict is against the evidence and the weight of evidence is not sufficient. *Ib.*

11. ——— EVIDENCE NOT IN ABSTRACT.—The evidence not being presented in the abstract, the appellate court will not review the action of the trial court in refusing certain instructions as embracing in their hypotheses certain facts of which there was no evidence. *Lindsey v. Dixon, 291.*

12. COSTS FOR PRINTING ABSTRACTS.—Appellant filed in the appellate court a complete transcript of the record, and also filed an abstract of such record. His appeal being sustained he filed a motion to tax costs of printing his abstract against the respondent. *Held*, respondent is not liable for such costs, as he is taxable with the costs of the transcript. *Gage Bros. v. Rogers Sisters, 331.*

13. GROUNDS OF NEW TRIAL.—The appellate court, in reviewing the action of the trial of the court in granting a new trial, is not confined to the grounds stated in the order of the court, but may also consider those set out in the motion for a new trial. *Lovell v. Davis, 342.*

14. SETTING ASIDE VERDICT.—An appellate court will only vacate a judgment, as opposed to the weight of evidence, where it is so strongly opposed to all reasonable probabilities as to be the manifest result of passion or prejudice. *Ib.*

15. ABSTRACT—EVIDENCE—INSTRUCTIONS.—The appellate court will not consider objections to instructions which require an examination of the evidence, where the abstracts present mere excerpts from the evidence. *Aultman & Taylor Co. v. Smith, 351.*

16. ERROR NON-PREJUDICIAL—INSTRUCTION.—An instruction justly subject to criticism will not reverse unless it specially operated to the prejudice of the complainant. *Ib.*

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17. INSTRUCTION—HARMLESS ERROR—DE MINIMIS.—An appellant cannot complain of an error beneficial to him and prejudicial to respondent. The maxim *de minimis* applied. *The State ex rel. v. Gage Bros.* 464.

18. NON-PREJUDICIAL ERROR.—A judgment will not be reversed for non-prejudicial error; accordingly, error in refusing to permit a witness to testify whether a designated person had procured a judgment against him is not ground for reversal, since record proof of the judgment, if there was one, might have been produced. *The State to use v. Martin, 511.*

19. REVIEW OF FINDINGS OF FACT IN PROCEEDINGS IN EQUITY.—When the evidence in an action in equity is conflicting, the appellate court will defer somewhat to the finding of the trial court, since the latter court had the witnesses before it, and was, therefore, in the better position to judge of their credibility. *Toler v. McCabe, 532.*

20. REPRODUCTION OF THE EVIDENCE.—If the appellant in an action in equity desires to obtain a review by the appellate court of the finding of the trial court, he must as far as practicable reproduce in his transcript the same evidence which was before the trial court; and, in such case, where the witnesses testify as to the location of points or objects on a plat, and the location thereof is material, the points indicated by them should appear in some appropriate manner. *Ib.*

21. ADMISSION—INSTRUCTIONS—ABSTRACT.—The appellate courts will reverse where an instruction informs the jury that certain facts were admitted, but the abstract shows no such admission. *Adams v. Railroad, 590.*

22. INSTRUCTIONS.—Appellant cannot complain of matters conceded to him in his own instructions. *Helm v. Helm, 615.*

23. VERDICT BINDS.—If the trial court proceed on a correct theory of law, its finding, with any evidence to support it, binds. *Ib.*

24. BILL OF EXCEPTIONS—MOTIONS—AFFIDAVITS, ETC.—WAIVED.—Where no bill of exceptions is taken, the appellate court cannot notice matters in the shape of motions, affidavits, etc., and errors in the trial court in dealing with such matters are waived by failure to preserve exceptions. *Carver v. Swan, 646.*

25. TRIAL BY COURT—EVIDENCE AND FINDING—Where the trial is before the court without instructions, the only question for the appellate court is whether there was evidence to sustain the court in its finding. *Garrett v. Conklin, 654.*

26. AMENDMENT OF PETITION—FAILURE OF DEFENDANT TO EXCEPT.—The propriety of an amendment of the petition in the trial court by the addition of a party as plaintiff will not be considered on appeal, if no exception to the amendment is saved. *Keen v. Munger, 660.*

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PRACTICE, TRIAL. See REFEREE, 1.

1. ATTACHMENT—INTERPLEA OF WIFE—NON-RESIDENCY.—As the interplea must invariably be determined before a judgment in the attachment can be rendered, the bare allegation of the non-residency of the husband in the affidavit for the attachment cannot conclude the wife on the trial of the interplea. *Lindsey v. Dixon, 291.*

2. ——— ——— ———. A justice of the peace in an attachment proceeding struck out a wife's interplea claiming the exempt property of her absconding husband, and rendered judgment in the attachment suit for the plaintiff. The wife then appealed to the circuit court. *Held,* the judgment of the justice could not prejudice or impair the wife's full right to claim the exemption, though the attachment was based among other things upon the non-residency of the husband. *Ib.*

3. EVIDENCE—JURY QUESTION.—Where there is evidence sufficient to support a verdict for or against any issue, such issue is properly submitted to the jury. *Rhoades v. McNulty, 301.*

4. VARIANCE—AFFIDAVITS.—No variance between the allegation and the proofs shall be deemed fatal unless it has actully misled the party to his prejudice on the merits, which must be made to appear by affidavit. *Clydesdale Horse Co. v. Bennett, 333.*

5. POWER TO GRANT NEW TRIAL—MOTION FOR.—In passing upon the question of granting a new trial, the trial court is not confined to the grounds set out in the motion, but independent of the motion may grant a new trial for any good cause. *Lovell v. Davis, 342.*

6. DEMURRER.—Where at the close of plaintiff's case defendant presents a demurrer, and, on its refusal, introduces testimony in his own behalf, he takes the risk of aiding plaintiff's case, waives his demurrer, and cannot afterwards be heard to complain of its refusal. If his own testimony does not come to plaintiff's relief, he can again demur to the whole evidence, but, if the trial be before the court, he need not demur again, and his failure to do so does not admit plaintiff has a standing on the facts. *Felix v. Bevington, 403.*

7. AMENDMENT—CONTINUANCE—WAIVER—DISCRETION.—An amendment that is merely formal and does not change substantially the cause of action can be made at any stage of the trial, and does not afford a ground for a continuance, and the discretion of the trial court will not be interfered with unless it has been oppressively exercised; and where the amendment is answered and the trial proceeds the objection is waived. *The State ex rel. v. Gage Bros., 464.*

8. LEADING QUESTIONS TO WITNESSES.—It is within the discretion of the trial court to permit or refuse to permit leading questions to be propounded to a witness by the party producing him. *The State to use v. Martin, 511.*

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9. Vacation of judgment—laches of attorneys.—The attorneys for the defendant in this case filed an insufficient application for a change of venue, and then left the court. This application was overruled, and the case was tried in their absence. *Held*, that they were guilty of laches, and that the refusal of the trial court to vacate the judgment upon motion of the defendant was, therefore, not erroneous. *Anderson v. Perkins, 527.*

10. Objections to evidence.—An objection to the competency of evidence as to value is not specific enough to raise the question whether the witness is qualified to testify as an expert upon the subject. *Young v. Railroad, 530.*

11. Motion in arrest—motion for new trial—effect—appeal. Judgment went against defendant, who moved in arrest, and the judgment was arrested and he discharged. Plaintiff excepted, and filed his motion to set aside the judgment and for a new trial, on which no action was taken until the next term, it being carried over without an order of continuance. It was overruled and plaintiff appealed. *Held*, whether a motion for a new trial is a necessary prerequsite to an appeal in such case or not, the appeal was taken in time and the effect of the motion was to hold the judgment in suspense and to carry the cause over to the succeeding term. *Horn v. Excelsior Springs Co. 548.*

12. Continuance.—A cause or motion undisposed of goes to the succeeding term, though no formal order of continuance is entered. *Ib.*

13. Affirming justice's judgment—insufficient statement.—Plaintiff had judgment before the justice, and, on the same day, and more than ten days before the next term of the circuit court, defendant appealed. At said term he failed to appear and prosecute his appeal, whereupon, on plaintiff's motion, the circuit court affirmed the judgment of the justice. Within four days defendant filed his motion in arrest on the ground that the statement did not state a cause of action, which was sustained. *Held* error, since being in default the defendant cannot question the regularity or sufficiency of the proceeding visiting the statutory penalty upon him. *Ib.*

14. Appeal.—Where the appeal from the justice's judgment is taken on the day of the trial, which is more than ten days before the next succeeding term of the circuit court, and the appellant fails to prosecute his appeal, the judgment should be affirmed. *Ib.*

15. Pleading—indefinite account.—A petition declared on the balance of an account for $1,500, averring that an itemized statement was thereto attached, but no such statement was attached. Defendant demurred on account of that defect, which demurrer the court struck out. Defendant then moved to have the petition and account made more definite, and this motion was overruled, and, the defendant declining to plead further, judgment was rendered for

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plaintiff. *Held* error, as defendant should be informed of the different items that go to make up the account, and had attempted in every way known to the practice to have the defect in the petition properly cured. *Savings Ass'n v. Morris, 612.*

16. REFERENCE.—The trial court was authorized by statute to refer this case. *Leavel v. Porter, 632.*

17. LAWS OF SISTER STATES.—The laws of a sister state must be alleged and proved as an issue of fact or they will not be considered by the courts. *Garrett v. Conklin, 654.*

PRESUMPTIONS. See MUNICIPAL CORPORATIONS, 1; PARENT AND CHILD, 1.

1. FOREIGN LAW—PRESUMPTIONS.—A foreign law must be proved like any other fact, and, in the absence of such proof, it will be assumed that the common law prevails in the foreign jurisdiction. *Boll v. Smelting & Mining Co., 60.*

2. PRACTICE, APPELLATE—DUTY OF APPELLANT IN REGARD TO TRANSCRIPT.—In all cases in which a bill of exceptions is filed, the appellant should notify the clerk whether he desires a perfect transcript of all the proceedings, or merely a transcript of the record entry of the judgment and appeal; and he is in default if he fails to do so. *Messick v. Fairburn, 69.*

3. ——— FAILURE OF APPELLANT TO PAY FILING FEE.—When the defendant in a criminal cause appeals, but fails to pay the clerk of this court the filing fee, and in consequence the cause is not docketed, the state may procure an affirmance of the judgment on the production of a certificate under the statute. *The State v. Martin, 71.*

4. BURDEN OF PROOF.—When an indebtedness is once shown to exist, it is presumed to continue unless the contrary is shown. Accordingly, when a collection of money by an agent for his principal is established, there is no presumption that he has paid or accounted for it to his principal. *Carder v. Primm, 102.*

PRINCIPAL AND AGENT. See ACTION, 3; BURDEN OF PROOF, 1; CONVERSION, 4; FRAUDS AND PERJURIES, 2.

1. STATUTE OF LIMITATIONS.—With respect to a claim by a principal against his agent for money collected by the latter for him, the statute of limitations does not begin to run until the principal has notice of the collection, and possibly not until demanded by him. *Carder v. Primm, 102.*

2. RIGHT OF LATTER TO COMPENSATION.—The defendant in this cause employed the plaintiff to procure from a third party a contract for the sale of the latter's leasehold interest in certain realty, and agreed to pay the plaintiff a fixed compensation as soon as the contract was obtained. The plaintiff procured the contract, but the

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sale was not consummated because the leasehold title contracted for was valueless, it being incumbered for its full value. *Held*, that the plaintiff having acted in ignorance of this defect in the title, and having performed the services agreed upon, was entitled to the stipulated compensation. *Hart v. Hopson*, 177.

3. CONTRIBUTION.—Plaintiff and defendant were co-sureties on two promissory notes, on one of which judgment was obtained against both, and on the other against plaintiff only. Executions were levied on plaintiff's land, which plaintiff then conveyed to defendant in consideration of his satisfying the executions, which he did. *Held*, plaintiff's land paid the judgments, and defendant must contribute his half of the debt to plaintiff. *Held, further*, the deed and agreement was not a final settlement between the co-sureties, nor a new contract superseding their prior relations and constituting a bar to the contribution. *Frost v. Tracy*, 308.

4. HOLDING OUT — RATIFICATION — VARIANCE.—Plaintiff bought of defendant's agent a horse on condition that, if he did not prove as warranted, he should be returned to defendants, who agreed to replace him with another of the same breed and price. Plaintiff returned the horse to the same agent at the defendants' stable, who received him, showed plaintiff other horses, but offered none of the same breed and price as it demanded. Plaintiff tried to see defendants, but was unable to do so. There was in evidence an admission of one of the defendants that the agent had full charge of defendants' horse business. Defendants afterwards disposed of the returned horse. *Held*:—

(1) The agent had power to bind the defendants by receiving the horse, and it was sufficient to make demand of him to replace him.

(2) That defendants ratified the act of the agent by disposing of the horse.

(3) That there was no variance between the evidence and the allegation that the plaintiff had returned the horse to defendants and made demand on them. *Clydesdale Horse Co. v. Bennett*, 333.

5. CORPORATION'S BOOKKEEPER'S REPRESENTATIONS — ESTOPPEL.—A corporation's bookkeeper's representation as to the state of account between the corporation and one of its customers is competent to bind that corporation, but his representation as to the risk of paying such customer, a contractor, the amount due on his contract for building defendant's house, as he was prompt and reliable, and that the bookkeeper would notify the defendant if the contractor did not pay his account, etc., do not bind the corporation, unless shown to have been made by its authority, and cannot constitute the basis of an estoppel, even if the defendant acted on the same. *Midland Lumber Co. v. Kreeger*, 418.

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6. Rescinded contract—money had and received.—W. agreed with F., agent of D., for the purchase of certain real estate, and W. paid to F. (for D.) $200 on account of the purchase price; D. having repudiated the agency refused to perform the contract, and thereupon W. disaffirmed and rescinded the same, and sued F. to recover the money still in his hands, without any change in his situation since its receipt. Such action is maintainable, and is not on the contract of the principal D., since he has abrogated and rescinded the same. *Winningham v. Fancher*, 458.

7. Agent's accounting.—The agent must be loyal to his principal, accounting to him alone; and this applies to all cases in which the agent holds a particular fund for a particular principal, provided the case be one in which the principal could recover from the agent, as he cannot in this case, since he has repudiated the agent and his contract. *Ib.*

8. Facts constituting the relation.—Defendant became owner of certain city cab property and took it to L., a liveryman, and agreed to pay a fixed price for board and the expense of maintenance as well as for care, and wanted him to manage it and look after it, and if possible get the expense of maintenance out of it. *Held*, L. operated the property for defendant and as his superintendent. *Sandifer v. Lynn*, 553.

PRINCIPAL AND SURETY.

1. Cashier's employment—evidence.—The sureties of a cashier ought not to be held for an act of his not done for the bank as cashier, but the terms and conditions of his employment may be shown, though they are not set out in the books of the directory. *Mt. Vernon Bank v. Porter*, 244.

2. Banks and banking—power to negotiate bonds.—Under the statutory charter of Missouri state banks they are authorized to handle negotiable bonds, and can sell or place them for their customers, and the sureties of a cashier would be liable for his misappropriation of the profits of such transaction. *Ib.*

3. Official bond—addition of new office.—C. qualified and gave bond, as public administrator, in January, 1885. In March thereafter the legislature created the office of public guardian and curator, and imposed its duties on the public administrator. *Held*, his sureties must be held for his default, in so far as concerns his maladministration of his duties of public administrator, properly so called, but they cannot be held on account of any default in the performance of the duties pertaining to the office of public guardian and curator. *The State ex rel. v. Cheaney*, 258.

4. Extending time—consideration.—In order to discharge a surety an agreement between the creditor and the principal debtor extending the time of payment must be upon a valuable consideration and

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a definite time, and so bar the action of the creditor during such time, and preclude the surety from asserting his right in court. *Aultman & Taylor Co. v. Smith, 351.*

5. RESORT TO COLLATERAL SECURITY—SUBROGATION—COMMON ERROR. A surety cannot compel the creditor to exhaust liens and collaterals before he can look to the personal liability of the surety, who can pay his debt and avail himself of the liens, rights and advantages of the creditor; but, appellant having adopted such theory in his instructions, is estopped to complain thereof. *Ib.*

6. ATTACHMENT BOND—JUDGMENT AND GARNISHMENT ON FORTHCOMING BOND.—A defendant in attachment gave a forthcoming bond, which, after judgment and execution unsatisfied in the attachment proceeding, was assigned to attaching plaintiff, who had judgment thereon, and took out execution and summoned S. as garnishee. S. won on the garnishment proceeding and recovered his attorneys' fees and costs. To collect this judgment he commenced suit on the original attachment bond. *Held*, the action was maintainable. *The State ex rel. v. Immer, 536.*

7. SURETY'S LIABILITY.—The court approves the following findings of law in the referee's report in this case:

(1) The sureties on the bond of a contractor for his faithful performance of a building contract are liable for his failure to comply with his contract in his leaving unpaid material bills, and for the cost of finishing the work left incomplete, and for the liquidated damages for overtime required to complete the building.

(2) Any change in the contract without the surety's consent releases him, and his liability cannot be extended by implication or liberal intendment.

(3) Surety cannot take advantage of his principal's wrong, and make that an excuse for his release which the bond says shall be the reason of his liability.

(4) The contract called for the construction of a two-story and attic frame dwelling, with cistern, etc., and made the specifications, etc., part of the contract; the bond for the faithful performance of the contract required the construction and completion of a two-story and attic building, as provided for in the contract; the sureties are bound by everything contained in the specifications, etc., including cistern, etc.

(5) A building contract provided that seventy-five per cent. of the contract price should be paid on weekly estimates of the architect, and the remainder was retained until the building was completed and accepted, and satisfactory evidence was furnished that no claims existed against the building. *Held*, such evidence was not required on the weekly payments, and only on the final. *Leavel v. Porter, 632.*

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PRIVILEGED COMMUNICATIONS. See ATTORNEY AND CLIENT, 4.

PROCESS. See CORPORATIONS, 19.

RAILROADS.

1. STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE OF TRAVELER INJURED ON HIGHWAY.—When a traveler on the streets of a city approaches a street railway operated by cable—in this cause he knew that the railway was being thus operated—it cannot as a matter of law be ordinarily regarded as his duty to stop, but he is bound to make a fair exercise of his faculties before driving upon a point of danger, and, to this end, he is bound to listen for the customary signal, and to look for the approach of trains unless his view is obstructed, and a failure so to do will constitute contributory negligence upon his part, if he is injured in consequence. *Smith v. Citizens Ry. Co.*, 36.

2. ——— ——— LIABILITY OF STREET RAILWAY COMPANIES.—Notwithstanding such contributory negligence on the part of the injured traveler, the street railway company will be responsible for injury caused to him through a collision with one of its trains, if the person in charge of such train saw him in time to have averted the injury, or, by the exercise of ordinary and reasonable care in keeping a lookout in front of him, might have discovered him at the point of danger in time to have avoided the injury. But *held* that the evidence in this cause did not establish such ground for liability. *Ib.*

3. ATTRACTIVE DANGERS ON RIGHT OF WAY.—It is negligence for a railway company to permit salt to remain exposed on its tracks, or on its right of way near them, so as to attract cattle, after it has become chargeable with notice that salt is thus exposed; and this, though it did not place the salt there, it being held guilty of negligence in such cases on the theory that its duty is to so police its right of way as to prevent and remove all attractive dangers placed on its tracks or right of way by its servants or others. *Burger v. Railroad*, 120.

4. ———. And, where salt has thus been left exposed under a warehouse on the right of way of a railway company and near its tracks, it was *held*, that the railroad company could not avoid liability in consequence thereof by mere proof that the warehouse belonged to a third party. *Ib.*

5. ——— EFFECT OF KNOWLEDGE OF DANGER BY OWNER OF STOCK.—An owner of stock may allow it to run at large notwithstanding that he knows that salt has been left thus exposed, and such knowledge will, therefore, not affect his right to recover for the loss of the stock in consequence of the negligence of the railway company. *Ib.*

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6. ——— SUFFICIENCY OF EVIDENCE OF RESULTING DAMAGES.—To authorize a recovery for the loss of cattle alleged to have resulted from such negligence, it is incumbent upon the plaintiff to show by substantial evidence that the negligence was the cause of the injury sued for, though such evidence may be circumstantial. And *held*, ROMBAUER, P. J., *dissenting*, that the evidence thereof in this cause was sufficient. *Ib.*

7. KILLING OF STOCK—DAMAGES.—The damages of the owner of stock for the negligent killing thereof cannot be reduced by proof of the value of parts of the carcass, it not being the duty of the owner to make use of the carcass. *Ib.*

8. ATTRACTIVE DANGERS ON RIGHT OF WAY.—While a railway company is under an obligation to police its track, so as not to make it extra hazardous to cattle at large, it is not under a similar duty with respect to its right of way outside of its tracks. [Per ROMBAUER, P. J., *dissenting.*] *Ib.*

9. KILLING STOCK—CATTLE-GUARD—J. P.—ALLEGATION.—A complaint before a justice of the peace for killing stock by reason of an insufficient cattle-guard should allege, *first*, there was a certain crossing over defendant's railway in a certain township; *second*, that adjacent thereto defendant had failed to erect and maintain proper cattle-guards, etc.; *third*, that by reason thereof plaintiff's mare passed from the crossing to the track, etc. *Jones v. Railroad, 382.*

10. ——— ADJOINING TOWNSHIP.—Where an action before a justice of the peace for killing stock is brought in the township adjoining the one where the killing occurred, it should be so alleged in the complaint and shown by the evidence. *Ib.*

11. LIENS AGAINST—PLEADING—VARIANCE.—Both the lien filed against a railway company for work done in the construction of its road, and the petition in an action for the enforcement of it, should state the facts showing that the work was performed by the lienor under contract either with the railway company or its agent, or with one of the contractors or subcontractors therefor; and these statements should substantially agree. But *held*, that it was not a variance to state in the lien that the lienor contracted with a railway company, and in the petition that he contracted with a corporation acting in the premises as the agent or trustee of the railway company. *Mackler v. Railroad, 516.*

12. DAMAGES.—In an action against a railway company for double damages for the killing of a bull, which was more valuable for breeding purposes than for meat, such greater value should be taken into consideration in the assessment of the damages. *Young v. Railroad, 580.*

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13. Killing stock—entering track—presenting case.—On a retrial, the evidence should be presented with greater care, so as to show whether the animal entered the track from the public road or not, as in the one case the defendant would be liable; in the other, not. *Adams v. Railroad*, 590.

RATIFICATION. See Principal and Agent, 4.

RECEIVERS. See Corporation, 15.

REFEREE.

1. Report—finding of facts.—The finding of a referee on the issues of fact is regarded in the same light as a special verdict of a jury, and is not disturbed where there is substantial evidence to support it. *Leavel v. Porter*, 632.

2. Practice, trial—reference.—The trial court was authorized by statute to refer this case. *Ib.*

REFORMATION OF INSTRUMENT.

1. Of fire insurance policy—laches of insured.—It is the duty of the insured to promptly examine a fire insurance policy, when he receives it, and to see whether it corresponds with the agreement made therefor. He will not be entitled to the reformation of the policy, so as to make it conform to alleged oral agreements on the part of the soliciting agent of the insurance company, if he retains the policy without objection for an unreasonable time; nor will the inability of the insured to read alter the effect of such retention. *McHoney v. Ins. Co.*, 94.

2. Preponderance of the evidence.—Such oral agreements were established by the unsupported testimony of the insured alone, and his testimony was contradicted on every material point by that of the soliciting agent of the insurance company, who, moreover, at the date of the trial, was wholly disinterested. *Held*, that the preponderance of the evidence was, therefore, with the insurance company. *Ib.*

REMEDIES. See Sales, 9.

1. Effect of election—suit.—If plaintiff has an election between inconsistent remedies, as where one action is founded on an affirmance and the other upon a disaffirmance of a voidable sale or contract, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all; and the institution of a suit is such decisive act. *Johnson-Brinkman Com. Co. v. Railroad*, 407.

2. ——— attachment—replevin.—Plaintiff sold to Johnson three carloads of wheat to be paid for on delivery, and delivered the same by transferring the bills of lading therefor, and, thereupon, Johnson drew his check in plaintiff's favor for the purchase price, which check was dishonored the same day; and plaintiff on the same day

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sued Johnson in attachment, garnishing the defendant as his bailee and attaching in his hands the said wheat, the ground of attachment being that the wheat was not paid for on delivery, as contracted. Eight days afterwards plaintiff dismissed its attachment suit, and brought this action of replevin for the same wheat. *Held*, the attachment suit was an affirmance of the sale, and was inconsistent with the replevin proceeding, which was a disaffirmance thereof; and plaintiff's choice to sue in attachment precludes him from pursuing the remedy by replevin. *Ib.*

3. ELECTION FINAL—INJURY—JUDGMENT.—An election between inconsistent remedies will be final, and cannot be reconsidered even where no injury has been done by the choice, or would result from setting it aside; nor is it necessary to pursue the chosen remedy to a judgment to make the election final. *Ib.*

REPLEVIN. See CHATTEL MORTGAGES, 1; REMEDIES, 2; SALES, 4, 5, 6, 7.

1. PLAINTIFF'S OWN TITLE.—A plaintiff in replevin should recover on the strength of his own right, and not that of a third party. *Rhoades v. McNulty, 301.*

2. PARENT AND CHILD—GUARDIAN—THEORY OF PLEADING AND RECOVERY—INSTRUCTIONS.—A father is the natural guardian of his minor son, and is entitled to the possession of the son's personal property which came to the son through him, and may sue for the same, in which case the pleading should show his claim to be that of guardian; and the theory of the complaint and trial cannot, by the instructions, be changed from his individual right to his representative capacity. *Ib.*

3. CUSTODIA LEGIS—DELIVERY BOND—DISMISSAL.—On the service of a replevin writ defendant gave a delivery bond for the return of the property on the return day of the writ; before that day the suit was dismissed. *Held*, the property did not remain in the custody of the law until the return day of the writ, as it would had plaintiff retained possession thereof. *Ib.*

4. PRIOR PENDING ACTION — CERTIFICATE OF JUSTICE — BURDEN OF PROOF.—Where it appears a prior action was begun between the same parties over the same property, it devolves on the plaintiff to show by a preponderance of the testimony that that action was discontinued before the one on trial was instituted; where two certificates of the justice are conflicting as to the date of the dismissal of the former suit, the preponderance would not seem to be with the plaintiff. *Ib.*

5. SUFFICIENCY OF PETITION—AIDER BY VERDICT.—The petition in this cause, which was an action of replevin, alleged that the plaintiffs owned and were entitled to the possession of the property in controversy, a mill, and that the defendant, as sheriff of his county, had wrongfully seized the mill under a writ of attachment against

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a stranger, and closed the operation of it. *Held*, after a verdict for the plaintiff, that this was a sufficient allegation of a wrongful taking and detention of the property by the defendant. *Keen v. Munger*, 660.

6. ABSENCE OF AFFIDAVIT TO AMENDED PETITION.—An action of replevin can be maintained in this state without the statutory affidavit, and, therefore, a judgment should not be arrested therein, owing to the absence of such an affidavit; and especially is this so when, as in this cause, such arrest of judgment is sought because of the absence of such affidavit to an amended petition, and when the original petition is accompanied by such affidavit. *Ib.*

REVIVOR. See JUDGMENTS, 1.

SALES. See ATTACHMENT, 3; SHERIFFS, 1.

1. RESCISSION FOR MISREPRESENTATION—MATTER OF OPINION.—In the course of negotiations for the sale of a bar-room and stock of liquors, the seller stated that the liquors would last a certain time. *Held*, that this was merely an expression of opinion and belief, and that, even if it was false, it was not such a false representation as in law entitled a party to the rescission of a contract. *Brockhaus v. Schilling*, 73.

2. ——— DUTY OF DEFRAUDED PARTY.—A party who is induced to enter into a contract through material misrepresentation cannot maintain an action in equity for the rescission of the contract, where, owing to his failure to act promptly on learning of the misrepresentation; there has been such a change of circumstances that he cannot place the other contracting party *in statu quo*. *Ib.*

3. MATERIAL MISREPRESENTATION BY VENDOR—RECOUPMENT BY VENDEE.—Where, in such case, the vendor sues the vendee for the purchase price, the latter may, under proper pleadings, reduce the recovery by the amount of his damages in consequence of the misrepresentation; but he cannot entirely defeat a recovery, where there is not a complete failure of consideration. *Ib.*

4. INTENTION AND ABILITY TO PAY—JURY QUESTION.—A knowledge on the part of the purchaser at the time of making the purchase that he will not be able to pay for the goods is equal to an intent not to pay for them, and under the facts of this case the question of such intent should be submitted to the jury. *Reid v. Lloyd*, 278.

5. FRAUD—TITLE—RULE AS TO SUBSEQUENT VENDEE.—Marr & Shelton bought of plaintiffs a bill of goods when insolvent, but representing themselves as solvent. They shortly afterwards sold to the defendants. *Held*, if they bought said goods without intending to pay for the same, then no title passed to them which they could pass to defendants unless such goods were sold and delivered to the

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defendants for a valuable consideration, and in the usual and customary manner of making such transactions, without any knowledge of Marr & Shelton's fraud, or of such facts as would put a man of common prudence on his inquiry. *Ib.*

6. ——— SUBSEQUENT PURCHASER—PROCEDURE.—Marr & Shelton purchased goods of plaintiff without intending to pay for them, and sold them to defendants, of whom plaintiffs replevied them. *Held,* after plaintiffs' evidence showed the intention not to pay, the burden of proof was cast upon the defendants to show in a general way that they purchased in good faith, and for value, after which plaintiffs should show circumstances warranting the inference that defendants knew of the fraud or of facts to put them on inquiry. *Ib.*

7. ——— ——— JURY QUESTION.—Where a subsequent vendee of such fraudulent purchaser does not purchase in the usual and customary manner, *e. g.*, without taking an inventory, and knows his immediate vendors were embarrassed and compelled to close up their business, there is sufficient to put him on his inquiry, and to send the case to the jury. *Ib.*

8. RESCISSION—PROMPT ACTION—SILENCE.—If a vendor has been defrauded in the sale of his goods, and subsequently comes to the knowledge of such facts as would authorize a rescission, he must act at once, or his silence will be construed as a ratification. *Johnson-Brinkman Com. Co. v. Railroad, 408.*

9. CASH PAYMENT—REMEDIES.—If goods are sold for cash on delivery, then upon default of payment the seller had a clear right to either of the two remedies, to-wit, to affirm the sale and to sue in attachment for the purchase money, or revoke the sale and sue in replevin for the recovery of the specific articles sold. *Ib.*

10. RETAINING TITLES—EFFECT OF STATUTE.—Sections 5180 and 5181, Revised Statutes, 1889, were intended to make a radical change in the law relating to personal property, and to prevent secret transactions from injuring creditors and purchasers of apparent owners. *Wurmser v. Sivey, 425.*

SCIRE FACIAS. See JUDGMENTS, 1.

SERVICE. See CORPORATIONS, 19.

SHERIFFS.

ORDER OF SALE—GOODS OF STRANGER.—If a sheriff on an attachment writ against A seize the property of B, and if the court where the cause pending shall order a sale of the property as perishable, and the sheriff sell thereunder, he will be liable to B on his official bond. *The State ex rel. v. Hadlock, 297.*

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STATE BOUNDARY.

1. PLATTE PURCHASE ACT—MISSOURI RIVER.—The act of congress of June 7, 1836, extending the jurisdiction of the state of Missouri over the lands lying between its western boundary and the Missouri river carried the western boundary of the state to the center of the channel of the river. *Cooley v. Golden, 229.*

2. CHANGE OF CHANNEL—OF BED.—When a river is declared to be the boundary between states although it may change imperceptibly from natural causes, the river as it runs continues to be the boundary; but, if the river suddenly change its course or desert its original channel, the boundary remains in the middle of the deserted bed. *Ib.*

3. STATE JURISDICTION—CONCURRENT OVER MISSOURI RIVER, NOT OVER DESERTED BED.—The state of Missouri has concurrent jurisdiction over the entire channel of the Missouri river, while it forms a common boundary of this state and Nebraska, but when the river abandons its channel the jurisdiction extends only to the boundary line, the middle of the old channel before the change. *Ib.*

4. ——— FORCIBLE ENTRY.—The concurrent jurisdiction over a river forming a common boundary is not believed to confer authority upon one state to bring forcible entry and ejectment for the recovery of land within the limits of the other. *Ib.*

STATUTES CONSTRUED. See APPEALS, 1; CHATTEL MORTGAGES, 3; CONSTITUTIONAL LAW, 1; CORPORATIONS, 4, 5, 6, 7, 8, 9, 10, 18; SALES, 10; TABLE OF STATUTES, page xviii.

STATUTE OF FRAUDS. See FRAUDS AND PERJURIES.

STATUTE OF LIMITATIONS. See LIMITATIONS.

SUBROGATION. See MORTGAGES, 1; PRINCIPAL AND SURETY, 5.

THRESHING ENGINE. See NEGLIGENCE, 9, 10, 11.

TITLE. See SALES, 5.

TRADEMARKS.

1. INFRINGEMENT OF—SUFFICIENCY OF IMITATION.—In order to entitle the owner of a trademark to relief against imitation, it must appear that the similarity between the trademark and the alleged infringement was such as to deceive the ordinary consumer of the article to which the same was attached; but it is not necessary to establish that anyone was actually deceived by the imitation. *Tobacco Co. v. Tobacco Co., 10.*

2. ——— ——— INSPECTION—EXPERT EVIDENCE.—While the main test of the alleged resemblance is an inspection by the court of the original trademark, and of the alleged infringement, nevertheless,

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in determining whether an ordinary customer, having neither the opportunity for comparison nor the time for examination, would be likely to be deceived by the similarity, the opinion of witnesses familiar with the trade and the habits of the customers is of weight, and, when aided by evidences of actual deception, should be controlling, unless the dissimilarity between the two marks is such as to exclude any probability of deception. *Ib.*

3. ——— ——— EFFECT OF FRAUDULENT DESIGN.—While a fraudulent design need not be shown in order to entitle the owner of a trademark to the protection of his proprietary rights by injunction, when an interference therewith has been established by unequivocal proof, still less cogent evidence of the probability of deception by means of the imitation will suffice when an intention to deceive has been shown. In such a case it is not necessary that the resemblance between the trademark and the imitation should be so close as to deceive purchasers exercising ordinary care and prudence, but only that the similitude should be sufficient to deceive the incautious and unwary. *Ib.*

4. ——— RIGHT OF OWNER OF TRADEMARK TO AN ACCOUNTING.—This cause was one to enjoin an infringement of the plaintiff's trademark. The defendant had used the imitation in various shapes and forms for many years, and for part of the time without active objection on the part of the complainant. During this use, different changes in the shape and general appearance were introduced in the course of attempts at an amicable adjustment between the parties, and by reason of these matters a proper accounting was rendered difficult. Under these circumstances the accounting prayed for by the plaintiff was denied, without prejudice to his right to proceed at law for damages, if so advised. *Ib.*

TRUSTS AND TRUSTEES. See CORPORATIONS, 17, 18, 19.

1. ATTORNEY AND CLIENT.—A deed of trust in the event of the trustees therein named refusing to act authorized any attorney of record residing in the state of Missouri whom the beneficiary might appoint in writing to act. *Held*, the attorney of the beneficiary was competent to act. *(In re Mayfield*, 17 Mo. App. 684, *distinguished.) Cloud v. Kansas Loan & Trust Co., 318.*

2. MORTGAGEE AND ASSIGNEE.—While the mortgagee is trustee of his assignee of the note secured by the mortgage, such trust is within the statute, as only technical and continuing trusts fall without the statute. *Garrett v. Conklin, 654.*

VARIANCE. See MECHANICS' LIENS, 3; PRINCIPAL AND AGENT, 4; RAILROADS, 11.

VENDOR AND VENDEE. See DECEIT, 1; SALES, 1, 2, 3, 4, 5, 6.

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VERDICT. See PRACTICE, APPELLATE, 14.

1. JURORS—IMPEACHMENT OF—POLLING OF.—Considerations of public policy forbid that jurors should be heard to impeach their verdicts by showing their mistakes or misconduct; and their verdict, whether polled or not, cannot, as a general rule, be subsequently impeached by their affidavits. *The State ex rel. v. Gage Bros., 464.*

2. EVIDENCE.—The verdict in this case is *held* not to be the result of passion, etc. *Ib.*

WAIVER.

OF RIGHT TO EXEMPTIONS—GARNISHMENT AT THE INSTANCE OF THE EXECUTION DEBTOR.—The mere fact that an execution debtor procures the garnishment of one who owes him money will not debar him from claiming his exemptions out of the debt, if the debt exceeds the amount of the exemptions, since his action is consistent with an intention to only appropriate the excess to the payment of the execution. *Marchildon v. O'Hara, 523.*

WITNESSES. See EVIDENCE, 8; INSTRUCTIONS, 1.

1. VALUE OF LEGAL SERVICES—COMPETENCY OF NON-EXPERT WITNESSES. The value of legal services cannot be established by the opinion of a witness who is not shown to be an attorney at law, or in any way qualified to speak on the subject. *Fry v. Estes, 1.*

2. VALUE OF CROPS AND FARMING IMPLEMENTS—EXPERT EVIDENCE. Witnesses, shown to be farmers of many years' experience, are *prima facie* qualified to testify in regard to the value of crops, cattle and farming implements. If, on their cross-examination, it appears that they are not familiar with the value of the grain or cattle, because they had not seen them, or for other reasons, that will not put the trial court in the wrong for admitting their testimony in the first instance. *Ib.*

3. VALUE OF REALTY—COMPETENCY OF.—A real-estate agent, who testifies that he has made a particular study of the values of property in a certain locality, is a competent witness in regard to the value of a lot in that locality, though he is unable to give instances of actual sales at definite figures. *Mantz v. Maguire, 136.*

4. EXPERTS—WAIVER.—Where appellants objected to the testimony of certain witnesses, because they were not qualified as experts, and other witnesses of like qualifications were called without objection, the objection is deemed to be waived. *The State ex rel. v. Gage Bros., 464.*

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RULES GOVERNING PRACTICE

IN THE

KANSAS CITY COURT OF APPEALS.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-fonr hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;*" and if any pleading be

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amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called by for bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this Court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing, in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, prepare, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where

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the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

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RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Attest:

L. F. MCCOY, *Clerk.*

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RULES OF PRACTICE

OF THE

ST. LOUIS COURT OF APPEALS.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE.—Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave a written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not *(unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause)*, in making out transcripts of the record for this Court, set out

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the original or any subsequent writ, or the return thereof; but in lieu thereof shall say *(e. g.)*: *"Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;"* and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the Clerk of this Court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time. [*To be in force from and after October 20, 1891.*]

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes, 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. [*To be in force from and after October 20, 1891.*)

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts

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shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

The appellant, or plaintiff in error, shall also deliver a copy of said brief to the attorney of respondent, or defendant in error, at least ten days before before the day on which the cause is called for hearing, and the respondent, or defendant in error, shall at least five days before the cause is called for hearing, deliver to counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further statement as he may deem necessary, and shall file four copies thereof with the Clerk, at least one day before the case is called for hearing. Counsel for appellant, or plaintiff in error, if he so elects, may reply to such brief, by delivering a copy of his reply to counsel for respondent, or defendant in error, at least one day before the cause is called for hearing. The evidence of the service of such briefs and statements shall be filed with the Clerk before the day of hearing.

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGE ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the

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court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this Court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the Court, or that the decision rendered is in conflict with an express statute or with a controlling decision to which the attention of the Court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case, without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

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Rule 25.—Appearance of Counsel. The Counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days, before the first day of the term to which the appeal or writ of error is returnable; and, if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the Clerk of this Court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Ex. G. a. a.

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